JURIDICAL REFORM

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A CRITICAL COMPARISON OF PLEADING AND PRACTICE UNDER THE COMMON LAW AND EQUITY SYSTEMS OF PRACTICE, THE ENGLISH JUDICATURE ACTS, AND CODES OF THE SEVERAL STATES OF THIS COUNTRY, WITH A VIEW TO GREATER EFFICIENCY AND ECONOMY

By JOHN D. WORKS

Formerly Justice of the Supreme Court of California, Formerly United States Senator, and Author of "Indiana Pleading and Practice," "Courts and Their Jurisdiction," "Man's Duty to Man," "The European War and the Monroe Doctrine," and Other Books

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PREFACE

THIS little book is intended not only to point out some of the changes in the laws of pleading, practice, and procedure, necessary to mitigate present conditions resulting in interminable delays and enormous expense in maintaining the courts and the administration of justice, but also to show that a large part of the delays, and consequent unnecessary expense of litigation, is not brought about by defective laws alone but by the dilatory and faulty adminstration of the laws we have.

The author speaks from fifty years of active expeperience at the bar and on the bench, and out of an exalted conception of the duties and obligations of the courts, including the lawyers who, as sworn officers of the courts, constitute an important and responsible part of our juridical system. These duties and obligations are not to clients and litigants only but to the whole people, by whom the courts are ordained and supported. The courts are not established merely for the purpose of deciding disputes between individuals but to serve the public interests in the prompt, effective, and righteous administration of the laws.

What is said here in the way of criticism of the manner of conducting business by the courts is not personal, nor is it directed at any judge or judges

in particular. It is intended to call attention to the unfortunate habits and customs into which judges and lawyers have fallen, and to stimulate both to a more earnest, concerted, and coöperative effort to remedy the faults that have brought them both into just reproach and public disfavor.

It is believed that our judges and lawyers, taken as a whole, will compare favorably in standing, ability, and integrity with those of other countries, and that, with rare exceptions, they are performing their important duties conscientiously and with fidelity. But no one connected with the courts and familiar with their manner of doing business can fail to see that they are lax in their methods, and that they fail to administer and enforce our laws with the promptness that their duty requires of them. It is very largely this failure to act with promptness and with a firm determination to waste no time in the conduct of the business of the courts that has given rise to the persistent outcry against the "law's delays" and the country-wide demand for better things.

One of the primary objects of this book is to impress upon the minds of judges and lawyers that, in a greater degree than most of them think, the remedy for this evil rests with them rather than with the law-making power, and that it lies with them to restore to the courts the trust and confidence of the people, to which they are entitled if they do their whole duty.

Our courts are the representatives of justice, the guardians of the rights and liberties of the people of

a free Republic, and the protectors of the rights of litigants as between themselves, and as such they should have and maintain the respect and confidence of the whole people.

It is hoped that what is said here may help to inspire in the minds of judges and lawyers a higher sense of the grave responsibilities resting upon them and a stronger determination to make the courts in every way worthy of the highest respect and confidence.

J. D. W.

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CHAPTER I

INTRODUCTION

In no other branch of the law has there been such a complete revolution as in the law of practice and pleading. At the time Blackstone's "Commentaries" were written this branch of the law, and particularly that part of it relating to pleadings, had, under the common law of England, been reduced to a system that was the admiration of lawyers and students. Law was then regarded as almost an exact science. Every action, or suit, brought had its corresponding writ and declaration, and every subsequent step followed in logical order.

Every action, or suit, was known by the form of its writs and pleadings. If some new remedy were called for that did not fit in with one or the other of these unyielding writs, a new writ must be devised to fit the case. Every remedy that could be obtained by resorting to a court of justice had its corresponding action. A mistake in bringing assumpsit, when the remedy to be obtained called for an action of debt, or covenant, meant defeat. The party must go out of court and bring his action anew.

This logical exactness had its advantages, but it led to technicalities which not infrequently defeated the ends of justice. This administration of justice by the means of arbitrary and fixed rules led, after a time, to the most radical changes, which have brought us to almost, if not quite, the opposite extreme. Formerly there were two great systems of law, the civil law of Rome and the common law of England. The two were not entirely separated even in England and both have been transplanted to this country. In most of the States the common law was adopted, and in some, so far as it relates to the subject of practice and pleading, is still maintained and continued in force, although practically abolished, so far as matters of form are concerned, by statute in the mother country from which it was drawn.

In Louisiana the law of practice and pleading, although enacted into a code of practice, is practically a continuation of the civil law. In an interesting history of the rise of the laws of that state, by Mr. Leovy, appended to a compilation of the "Laws and Ordinances of the City of New Orleans," the author closes by saying:

It will be perceived, by this brief synopsis of the history of our city and state, that while we have retained in our public relations and criminal law, all that is good of the English jurisprudence, the systems of laws now in existence in Louisiana is the Roman or Civil Law as we have received it from France and Spain, modified by the legislation of their sovereigns and councils and illustrated and adorned by the commentaries of many gen-

erations of learned jurists, and adapted, by the enactments of our own Legislature, to the requirements of an age of commerce, of arts and sciences, and of unparalleled civilization.

The same warfare that brought about the change of procedure from the technical and arbitrary rules of the common law to the more liberal and plastic rules of the codes of the several States in this country was waged against the civil law as it existed in earlier times, with a similar result. One of the grounds upon which the common law is sometimes commended, as compared with the modern civil law, is its fixed and unchanging character, which leaves nothing to the discretion of the judges. No doubt it was this very characteristic of the common law, as applied to the rules of practice and pleading, that brought about its downfall. What was regarded as its crowning virtue, by judges and lawyers who were educated under it, has been regarded as its chief fault by modern lawmakers.

In the introduction to Taylor's American Edition to Mr. Stephen's admirable work on "Pleading" will be found a very strong endorsement of the common law system, in which the learned editor, after pointing out the differences between the Civil and Common law says:

It is this primary difference in the principles of practice, under the two systems of law, which gives to the common law its great superiority over the civil law, as a practical jurisprudence regulating the affairs of society.

It has the great advantage of producing certainty in regard to all rights and obligations which are regulated by law. But above all it excludes private interpretation and controls the arbitrary discretion of judges. * * * This difference in the administrative principles of the common law, and the civil law, is intimately connected with their different modes of procedure and with the different degree of respect paid to technical forms. Under the common law forms are as sacred as the principles they embody. * * * The great instrument by which certainty has been given to precedents in the common law is special pleading. This is the mainspring and the regulative force of the whole machinery of the common law as a practical jurisprudence. By it every step from the original writ to the judgment is kept in specific undeviating forms. There can be no dispute about the specific import of every step in the procedure.

Yet, notwithstanding the great merits of this system of arbitrary forms and special pleadings, this particular part of it has, throughout the greater part of this country and in England, been swept out of existence by a system that lacks the very qualities that are so strongly commended, and which, as we shall see when we come to speak of the code system of pleading, were the qualities sought to be avoided by the new system of pleading and practice.

To these two great systems of law, in force before the codes were adopted, must be added those rules of pleading and practice that were adopted by courts of equity. These were modeled after the civil law, but were so far different as to constitute a system to

itself. The courts of chancery were not bound by technical or arbitrary forms, or rules of procedure. The pleadings consisted of a statement at large of the facts constituting the cause of action or defense.

The necessity for this departure from the common law procedure was twofold. The *forms* of common law pleadings did not include certain causes of action that called for some remedy, and in certain other causes of complaint, where the forms of procedure were sufficient to afford some relief, the remedy afforded by a court of law, which was confined to a judgment for money or for specific property, was inadequate. In many cases a mere money judgment wholly failed as a remedy for the injury inflicted. While the advocates of the reformed system of pleading and practice dwell upon the first of these, viz., the privilege of pleading without form, as of great importance, it is apprehended that the latter was of much more serious consequence to the litigant.

It is unnecessary to enter here upon an extended history of the rise of the equitable procedure, or to discuss its merits as compared with the common law system. An unprejudiced student will probably arrive at the conclusion that the extreme advocates of both of these systems and of the code system are in the wrong; that all of these systems have their advantages, and that an accurate knowledge of all is absolutely essential to a lawyer's education. So far as the forms in use in common law actions were applicable to and covered the cases that might properly be brought in the common law courts, they were not objectionable.

By their use the practice was made more simple, accurate, and systematic.

But the fact that cases arose in which these forms were not applicable, and that the common law courts adhered strongly to the doctrine that, unless a given case fell within one or another of the forms provided, a suitor must be deprived of all relief, rendered the system defective and inadequate to the proper administration of justice. The only means of obviating this serious defect was to adopt new forms of writs and pleadings, as the necessity therefor might arise. This was provided for in England by statute, but it was not an entire removal of the defect and proved unsatisfactory. In the States of this country which still retain the common law procedure, it has been modified in many particulars by statute; but these modifications were not enough for the advocates of the present code system; therefore, in many of the States, the common law system of practice and pleading has been abolished, so far as it can be done, and a system similar to but not the same as the equity procedure has been substituted. The characteristic feature of the code system of pleading is its entire want of form and, to a logical and methodical mind, this is its most objectionable feature. It requires that the *facts* constituting the cause of action or defense shall be stated in the pleading in plain and concise terms. This calls for a different form of pleading in every action, because no two cases are ever entirely alike. And if they were, no two lawyers would state them alike.

The ability to state the facts constituting a cause of

action, in plain and concise language, is an exceedingly rare one, as the experience of every lawyer proves. The tendency of most lawyers is to overstate their cause of action by pleading the *evidence* instead of the *facts*. This may be said to be the fault of the pleader and not of the codes; but while this is true, in a sense, the manner of pleading required brings about this result. This tendency to plead too much has brought the code system of pleading into just reproach and has caused many of its advocates to question whether the change from the common law to the code system of pleading and practice has, upon the whole, been of any advantage.

But it is believed that too radical views have been taken of the change actually brought about by the "reform procedure," so-called. It cannot be denied that, notwithstanding the changes made in the forms of procedure, the present system of pleading and practice is largely affected by the common law as well as by equitable rules. The student who confines himself in the study of the law of pleading to the codes, and the adjudicated cases under them, would be but poorly equipped for the duties of his profession. A thorough and accurate knowledge of Blackstone's "Commentaries" and Stephen on "Pleading" is still regarded as absolutely essential, in order to entitle an applicant to admission to practice in the courts of those States in which an examination for admission is necessary.

It is a mistake to suppose that, by the adoption of the codes, the common law applicable to the subject of practice and pleading ceased to be important. The

change made was in the *forms* of pleading, in the distinctive names of actions, and did not influence the general principles affecting the remedy, or the grounds upon which a recovery might be had. Under the codes, in order to entitle a plaintiff to recover a debt, or upon a cause of action in assumpsit, covenant, or any other common law action, the same facts must be *proved* as were required to be proved at common law. Under the codes those *facts* must be *alleged* in the complaint. At common law a fixed form applicable to all actions of debt, or assumpsit, covenant, or other action, as the case might be, was required, and under that form the facts might be *proved*.

As affecting the right of recovery, no substantial change has been made in these different classes of actions. The same breach of contract that entitled the injured party to maintain an action of covenant, or the forcible injury that would give rise to an action of trespass *vi et armis* at common law, will create a cause of action under the codes and entitle the injured party to precisely the same relief. The material difference is that the form of pleading necessary to obtain the relief is different, and instead of denominating his action "covenant" or "trespass," it is under the codes a "civil action" which includes them both.

Again, it is a mistaken notion that the equitable rules of pleading and practice have ceased to be important under our code practice. The line that divides equitable and common law actions, so far as it affects the relief to be obtained, is as clearly marked to-day as it was in the time of Sir William Blackstone;

and it is just as important now as it was then that the student and the lawyer should understand the distinction between the two, not only for the purpose of judging accurately as to the rights of his client but in order to plead correctly. The failure to draw his complaint, or petition, in proper form may not be as serious in its consequences as it would have been under the old system of pleading, but the attorney who pleads the *facts* constituting what he believes to be a common law cause of action entitling him to a money judgment, and who tries his case upon that belief, when the facts alleged constitute an equitable cause of action, would hardly be regarded as a competent and reliable lawyer. Such want of knowledge might deprive his client of valuable rights.

For example, to proceed upon the belief that his cause of action is equitable, when in fact it is a common law action, would in most of the States deprive his client of the right of trial by jury. The distinction between the *forms* of common law and equitable actions is abolished, but the distinction between the two still exists and cannot be removed either by legislative enactment or otherwise. It exists in the nature of things. Not only so but this distinction is recognized and maintained by the codes. For example, the right of trial by jury depends upon this distinction, under the constitutions of most of the States the right being preserved in common law actions and denied in actions cognizable in equity, and the codes maintain this distinction in practice. It is equally true that while the *forms* of common law actions are abolished, the

distinction between them not only exists but is in a large measure recognized and maintained by the codes. The action to "recover personal property" is essentially the modern common law action of "replevin"; the action for "the conversion of personal property" is the action of "trover," relieved of the fiction that the property was found by the defendant, and the action to "recover real property and damages therefore" is the common law action of "ejectment." The codes class all these in the one "civil action," it is true; but the actions are still the same, and the grounds upon which a plaintiff may recover remain unchanged.

Thus, it appears that both the common law and equity rules of pleading and practice enter into the present law on the subject, and are material to be considered and understood by every student and lawyer. The apparent mistake in the works on code pleading and practice has consisted in an effort to treat the law relating to the subject as if the common law and the codes were entirely separate and distinct from each other, and in treating the subject as if the common law and equity rules were entirely abrogated, and resort can only be had to the codes for light on the subject. The result has been that students are educated first in the elementary principles of the common law, then in the codes, as two separate and distinct branches of the law, one of which has been superseded by the other; and the connection between the two, the fact that one is but a continuation of and extension and improvement of the other, seems to be overlooked.

Our purpose should be to consider the law of pleading and practice in the light of the common law, equity, and the codes, treating of the general principles affecting the subject as the law now is; how far the old law still exists and has a bearing on proceedings in court; how far the codes have abrogated the old law on the subject; and how far certain branches of the subject are affected by both the old law and the new. To consider the old law and the new as separate and distinct, but to bring them together and demonstrate, as far as may be, the relations of the two to each other and the effect of both on the present law of practice and pleading; doing this in such way as to impress upon the mind of the student the importance of taking both the old and the new law into account in an attempt to determine what is the present law of practice and pleading, what foundation is necessary to be laid in order to make the proof necessary to establish his claim, and what changes or reforms in these methods are necessary or advisable, is one of the purposes of this book.

The old common law theory that proper results could be had only by technical forms of pleading, resulting in a single and definite issue, has been very thoroughly exploded. So has it been shown that the chancery system of pleading the facts, and the code requirement that the plaintiff must allege the facts constituting his cause of action are neither of them necessary to the proper adjudication of the claim made. But it must be borne in mind that a reform in the pleadings that obviates these necessities under the

old systems does not affect the evidence or proof necessary to establish the plaintiff's right to recover or to defeat the claim by the defendant. If we are going to arrive at definite and intelligent conclusions in the attempt so to modify the methods of pleading as to save time, we must keep this distinction clearly in mind.

In order to demonstrate what *may* be done in the way of simplifying the pleadings, and thereby reducing the law's delays, it will be useful, interesting, and instructive to show what *has* been done up to this time with this object in view, by comparison of the laws and customs of England and the United States relating to the subject.

CHAPTER II

COURTS

BEFORE passing to the comparison of the systems of pleading and practice prevailing in England and this country it may be well to call attention, in a brief way, to the courts in the two countries by which the laws are construed and enforced.

In earlier times the three Superior Courts of common law in England were the Queen's Bench, Common Pleas, and Exchequer; and in chancery, the High Court of Chancery. To these were added the Admiralty, Probate, and Divorce courts, and the London Court of Bankruptcy.

As the result of Acts of Parliament, known as the Judicature Acts, all of these courts were on November 1st, 1873, consolidated into one court denominated the Supreme Court of Judicature. The Supreme Court was divided into two parts: Her Majesty's High Court of Justice and Her Majesty's Court of Appeal; the High Court being constituted of all the existing judges of the Court of Chancery, the courts of Queen's Bench, Common Pleas, Exchequer, Probate, Divorce, and Admiralty, in all twenty-five judges. The Court of Appeals was composed of three judges. Later the number of judges of the High Court was reduced by

three, and the judges of appeal increased by the same number. Since then other changes have been made in the number of judges.

As a result of the several Judicature Acts, from 1873 to 1887, the High Court was made to consist of twenty-three judges; that is to say: the Lord Chancellor, the Lord Chief Justice of England, and twenty-one judges. For the better distribution of business, the High Court of Justice was originally divided into five divisions with names derived from the courts consolidated; namely: the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division. Later the Common Pleas and Exchequer Divisions were consolidated into the Queen's Bench Division, so that the court was thereby reduced to three divisions; but these divisions are not separate courts; they are parts of one court, and the judges sitting in all of them are judges of the High Court, exercising the jurisdiction of that court, while the officers acting in each division are officers of the one High Court; the judges and officers being distributed to the several divisions, yet subject to call to act in other divisions. Obviously this consolidation of many separate courts into one tended towards greater expedition and efficiency, less delay, and less expense in the administration of justice. But this alone would have amounted to but little in the way of a much needed reform. As will be shown further along, however, the several Judicature Acts brought about other more important and necessary reforms.

In this country the conditions affecting the administration and enforcement of the laws are elastic in the extreme. The existence of governments within a government has resulted in the establishment in the different States, of many courts, with different names, different powers and jurisdiction, and different practice and procedure. This is bad enough in the separate States, but as affecting the practice of the law in the country as a whole it is much worse. However competent he may be, a lawyer attempting to practice his profession out of his own State is bewildered and inefficient because of the difference in the practice and procedure in another State.

Therefore, one of the first steps towards purely judicial reform should be the establishment of one uniform court in all the States in the country, with like powers and jurisdiction, and of the same name. The American Bar Association could, if it would, bring about this improvement in conditions. The example of England is an object lesson that should help such a movement along. If this could not be done at once, —and it would necessarily take time,—the reform could be commenced in the several States. Irrespective of conditions elsewhere, most of the States have too many courts with separate and distinct jurisdiction. This reform has already been effected to a great extent in some of the States but others still cling to the old systems of circuit, common pleas, and probate or county courts, and the like, each with separate and different jurisdiction from the other. That was just the condition in Great Britain that was intended to

be remedied by the Judicature Acts. The maintenance of several courts, where one would meet every need, adds greatly to the expense and nothing to the efficiency of the courts. As a rule, separate sets of officers and employees are necessary for each of the courts, and other unnecessary expenses are incurred, without any compensatory returns.

In California, as an example, there is but one court of general original jurisdiction. The general civil, probate, and criminal business is all conducted in this one court. The court is divided into separate "departments," instead of "divisions," as in England. These departments are not, as in England, designated in accordance with the former jurisdiction of separate courts, as "civil," "criminal," "probate," and the like. They are all alike the "Superior Court." But certain of these departments, for convenience, are devoted to certain kinds of practice; for example, criminal, or probate, business. A Presiding Judge is elected each year, who distributes the business to the several departments and conducts the business to be done in chambers, such as signing the various preliminary orders and the like. This system has worked very well and is greatly superior to the old system of separate courts.

California has, however, committed the blunder of creating an intermediate "District Court of Appeals," with defined and limited jurisdiction. This was thought to be necessary because the Supreme Court, the highest appellate court, was unable to keep up

with the growing legal business of the State. But this could have been much better done by enlarging the Supreme Court and dividing it into separate departments, or divisions, sitting in different parts of the State, each of such departments being a part of the one court. The chief objection to this was the claim that it would result in conflicting decisions in the different departments, but this could easily have been obviated by designating a part of the court,—for example, the Chief Justice and the Presiding Justices of the several departments,—as a court of review, to determine which of the conflicting decisions should stand as the decision of the whole court.

Volume LXXIII of the "Annals of the American Academy of Political and Social Science," September, 1917, was devoted to the subject "Justice through Simplified Legal Procedure." It contained a very interesting and learned discussion of the subject, but it was, in the main, the advancement, in a learned and scientific way, of theories rather than a practical solution of a very important question. Among other things was a "Report to the Phi Delta Phi Club of New York City, by its Committee of Nine," on "The Simplification of the Machinery of Justice, with a View to Its Greater Efficiency." The report is very long, and discusses many things that would be of little practical value in any effort that may be made to bring about useful reforms in judicial procedure; but it did contain some valuable and practical suggestions. One of them was this:

Our first task, therefore, and the task of greatest importance, is to suggest to the bar and to the people of the state, by means of a model Judiciary Article, the three fundamental principles of a complete reform:

(a) A uniform court;

(b) With administrative and disciplinary machinery inherent within that court; and

(c) Provision for reducing the volume of business and rendering the course of justice more expeditious and sure. We propose, therefore, the following Judiciary Article, each section being printed in bold face type and the discussion following immediately after each section as the text of our report.

Section 1.—Judicial Power; re-constitution of courts. —The judicial power of this State shall be vested in the Court of the State of New York. In this Court the People may sue, and without further consent, be sued. Nevertheless, the legislature may provide for a court for the trial of impeachments and for the election and appointment of justices of the peace.

The suggestion of a "uniform" court is a good one. But why the "Court of the State of New York?" Why not a court of a distinctive name that could be adopted by other States, thereby making one court "uniform" throughout the whole country. To confine the effort to reform to one State, or to the States separately, is too narrow a view to take of the necessities of the situation. Perhaps no State in the Union needs this reform more, or even as much, as the State of New York, but they all need it in greater or less degree, and the reform movement should embrace the country as a whole.

This reform has been recommended by various organizations and committees throughout the country, mostly in the East, and is well supported by the English Judicature Acts and the experience of that country under those Acts. The American Bar Association has been endeavoring, with commendable zeal and with gratifying success, to bring about uniform laws throughout the States, on various subjects. It may fairly be suggested that the question of uniform laws on the subject of Practice and Pleading is one of the most important of them all, as it affects the public interests and the rights of litigants. As the need is great, it is to be hoped that this great body of American lawyers and judges will give this matter its most careful consideration.

The report to which reference has been made, after providing for a "uniform" court made provision for the separation of the court into divisions, as in the English Judicature Acts; provided for the election of the chief justice of the court by the people, and the appointment of the justices of the court by the chief justice, with the approval of the "Board of Assignment and Control," which latter was provided for as follows:

Section 9.—The Board of Assignment and Control.—The administrative business of the Court of the State of New York shall be conducted by the Board of Assignment and Control composed of the chief justice, the presiding justice of the section of appeal and of one justice from each judicial department elected annually,

Every power adequate to that end is hereby conferred upon it.

It shall promulgate rules for conducting the judicial business of the Court of the State of New York, and may prescribe common forms for use therein. In the absence of action by the legislature it may prescribe rules of evidence. It shall from time to time define the number and jurisdiction in civil or criminal matters of the several divisions of the Court of the State of New York and prescribe the parts and terms thereof, and assign justices to service therein.

It shall act without delay upon all appointments of justices and of masters made by the chief justice under Sections 5 and 8 hereof.

It shall provide for the appointment of the official staff of the Court of the State of New York, except that each justice may, subject to its approval, appoint his own private secretary and confidential attendant.

It shall prescribe requirements of character and attainments for admission to the bar, including the oath of office, and shall admit those applicants who shall comply therewith.

It shall certify annually to the legislature such judgments against the people of this State as may require an appropriation.

The chief justice shall be the chairman of the Board of Assignment and Control.

To this was added a "Committee of Discipline," to be composed of five justices and two members of the bar, with the chief justice as an ex-officio member and chairman of the committee. This committee is authorized by this proposed plan to maintain and enforce

discipline among the justices, members of the bar, and officials of the court.

There is great merit in the reforms proposed by this Committee, and the report, in this particular, is worthy of mature and earnest consideration.

In a very interesting address before the American Bar Association at its annual meeting in August, 1906, on "The Causes of Popular Dissatisfaction with the Administration of Justice," Prof. Roscoe Pound, Professor of Jurisprudence in Harvard University, said of the modern English system of practice and procedure, respecting the unification of courts, as compared with our own:

> But the plan, although adopted in part only, deserves the careful study of American lawyers as a model modern judicial organization. Its chief features were (1) to set up a single court, complete in itself, embracing all superior courts and jurisdictions, (2) to include in this one court, as a branch thereof, a single court of final appeal. In the one branch, the court of first instance, all original jurisdiction at law, in equity, in admiralty, in bankruptcy, in probate and in divorce was to be consolidated; in the other branch, the court of appeal, the whole reviewing jurisdiction was to be established. This idea of unification, although not carried out completely, has proved most effective. Indeed, its advantages are self-evident. *Where the appellate tribunal and the court of first instance are branches of one court, all expenses of transfer of record, of transcripts, bills of exceptions, writs of error and citations is wiped out. The records are the records of the court, of which each tribunal is but a branch.* The court and

each branch thereof knows its own records, and no duplication and certification is required. Again, all appellate practice, with its attendant pitfalls, and all waste of judicial time in ascertaining how or whether a case has been brought into the court of review is done away with. One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of the counsel is concentrated upon the cause. On the other hand, our American reports bristle with fine points of appellate procedure. More than four per cent. of the digest paragraphs of the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely volumes 129 to 139, covering decisions of the Circuit Courts of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume.

And in a valuable report of Charles W. Eliot, Moorfield Story, Louis D. Brandeis, Adolph J. Rodenbeck, and Roscoe Pound, all distinguished for their learning and ability, to The National Economic League, this further was said on the same subject:

Effective administration of justice in the urban communities of to-day requires a unification of the judicial system whereby the whole judicial power of the state shall be vested in one organization, of which all tribunals shall be branches or departments or divisions. In organizing the personnel of this unified judicial department, the cardinal idea should be to permit the entire judicial force of the commonwealth to be employed in the most effective

manner possible upon the whole judicial business of the commonwealth, aiming to have specialist judges rather than specialized courts. Multiplication of tribunals is the first attempt of the law to meet the demand for specialization and division of labor. Yet it is at best a crude device. The need is for judges who are specialists in the class of causes with which they have to deal. This need may be met by specialized courts with specialized jurisdiction. But it may be met, also, by a unified court with specialist judges, to whom special classes of litigation are assigned. Undoubtedly much specialization is desirable and will be desirable increasingly in the future. But concurrent jurisdictions, jurisdictional lines between courts, with consequent litigation over the forum and the venue at the expense of the merits, and judges who can do but one thing no matter how little of that is to be done nor how much of something else, are not the way to provide therefor. Rather there should be specialized judges. As cases of a certain class become numerous and require that a specialist consider them, judges should be designated from the staff of the whole court for that purpose and the causes should be assigned to such judges, in the one court in which all causes are entered, by some functionary, whose duty it is to see that the judicial power of the commonwealth is fully utilized and is utilized to the best advantage.

Other endorsements of the idea of a unified court might be cited. It is strongly supported by leading lawyers and educators throughout the country.

CHAPTER III

ACTIONS

UNDER the common law system of practice and pleading that prevailed for so many years, up to the enactment of the first Judicature Act in England, in 1873, there were a number of actions specifically named, and for each of these there was a several writ, which constituted the commencement of the action. This being so, the form of action was a matter of great importance, often affecting, and sometimes defeating, a recovery altogether. So rigid was the rule on the subject that, unless a writ to fit the grievance complained of could be found, the complaining party was deprived of all remedy. To meet this difficulty that might lead to a denial of justice in given cases, new writs were from time to time devised.

Actions at common law were divided into real, personal, and mixed actions. Real actions were for the recovery of land, or real property, only; mixed actions for the recovery of real property, and damages for its detention; and personal actions for the recovery of personal property, or for damages for some injury to the person or the property. In earlier times real actions were quite numerous, but in 1833 they were all abolished except three, namely: "Writ of

right of dower," "dower *unde nihil habet,*" and *"quare impedit."*

Of mixed actions, the most important was the action of ejectment; and this action is still recognized, even in the codes of the States of this country, under the name of "actions for the recovery of real property." Personal actions were more numerous and were divided into actions *ex delicto* or founded upon tort, and actions *ex contractu* or founded upon contract.

Under the class of *ex delicto* actions were Trespass, Trespass on the case, Trover, Detinue, and Replevin. Those *ex contractu* were Covenant, Debt, Scire facias and Assumpsit. At times there were other forms of actions that were abolished or fell into disuse and became obsolete.

In chancery there was no classification of forms of actions designated by name. Besides those mentioned, there were certain statutory actions in England that call for no special consideration. There were certain well-defined remedies or causes of action in equity falling within the jurisdiction of the Court of Chancery, but they were not distinguished by specific forms of actions or writs. As suggested in the "Introduction" to this work, *forms* of actions and *causes* of action should not be confounded in the mind of the reader. While legislative bodies have abolished the forms of action and in some instances provided for others in their places, the *cause* of action remains the same, and must be established and the proper remedy secured just as before. Therefore, an accurate knowl-

edge of these old forms and what they stood for will help the student and the lawyer the better to understand what the cause of action is, and what the remedy.

In respect of the forms of action, all this was suddenly and completely changed in England by the Judicature Act of 1873, and rules of the Supreme Court made under it. The Act provides that her Majesty may, by Order in Council, made upon the recommendation of the Lord Chancellor, Lord Chief Justice, and other judges named, make rules for carrying out the act, among other things:

2. For regulating the pleading, practice and procedure in the High Court of Justice and Court of Appeal.

Acting in accordance with this authority, the following rule in the form of an "order" was adopted:

1. All actions which previously to the commencement of the Principal Act, were commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which, previously to the commencement of the Principal Act, were commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding *to be called an action.*

2. All other proceedings in and applications to the High Court may, subject to these Rules, be taken and made in the same manner as they would have been taken

and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Acts had not been passed.

So it will be seen that by virtue of this rule of court all the old forms of action were abolished, and in their place was substituted but one: "An Action."

No such step has been taken by the Congress of the United States respecting the practice in the Federal courts in this country. In most of the States the old common law forms of actions have been abolished, and in their stead we have by the code provisions "Actions" and "Special Proceedings." Taking the code of California as a fair sample of such reform legislation, so-called, "action" is defined to be "an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense." And it is provided: "Every other remedy is a special proceeding."

Again, actions are divided into civil and criminal. Then it is further provided:

§ 25. CIVIL ACTIONS ARISE OUT OF OBLIGATION OR INJURIES. A civil action arises out of:

1. An obligation;
2. An injury.

§ 26. OBLIGATION DEFINED. An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from:

1. Contract; or

2. Operation of law.

§ 27. DIVISION OF INJURIES. An injury is of two kinds:

1. To the person; and,

2. To property.

§ 28. INJURIES TO PROPERTY. An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it.

§ 29. INJURIES TO THE PERSON. Every other injury is an injury to the person.

There was not and never has been the slightest reason for either providing for special proceedings or the attempt to distinguish them from "actions." These proceedings are actions and nothing else, and should be so considered and treated. This division of proceedings into actions and special proceedings has led to great confusion and much unnecessary litigation, expense, and loss of time. The attempted arbitrary distinction between the two should be speedily abolished and all reference to special proceedings and all attempt to define them be eliminated from the codes. The object of reform procedure should be, in this respect, to eliminate all surplus or unnecessary forms of actions and proceedings and bring them down to but one.

In the attempts made on the part of the codes to distinguish and set apart special proceedings, they have selected certain writs such as those of prohibition, mandate, review, and others that look as if they might not be "ordinary" within the definition of "ac-

tions." Strangely enough, the California Code, after defining actions and special proceedings as above, provides further:

§ 363. WORD "ACTION" INCLUDES A SPECIAL PROCEEDING. The word "action," as used in this title, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

And, further, that the party presecuting a special proceeding may be known as the "plaintiff" and the adverse party as "defendant." The truth is that all of the proceedings attempted to be classed as "special" are actions. They are all "for the enforcement or protection of a right the redress or prevention of a wrong or the punishment of a public offense." What possible difference can it make in practice and procedure whether they are looked upon as "ordinary" or "special?" It is such absurdities as this that have brought the codes of the several States under just criticism. This single one has added immensely to the law's delays, and to unnecessary litigation over nonessentials that do not affect the merits of the real matters in controversy.

CHAPTER IV

PLEADINGS

By the English Judicature Acts the pleadings are reduced to the simplest forms yet conceivable for written pleadings. This has been attempted by the Codes of the several States, but with indifferent success. Indeed, it is doubted by many lawyers familiar with the common law system of pleading whether conditions were not made worse rather than better by the change. The certain and scientific mode of pleading that prevailed at common law has been superseded by one that is uncertain, slovenly, and unscientific. This could very well be borne, if the change had resulted in reducing the expenses of litigation and hastening the proceedings to final adjudication. But this may well be doubted.

In England now the "action" provided for is commenced by a writ of summons, which is a simple notice to the defendant to appear and answer, or suffer judgment by default. It differs in no material respect from the summons provided for by the State Codes. But the plaintiff is required to endorse on the back of this summons a statement of his cause of action. Two kinds of endorsements are provided for, denominated "general indorsements" and "special in-

dorsements." The former is made in very general form as, for example, the following as prescribed by the Rules established by the Supreme Court:

The plaintiff's claim is for work done and materials provided by the plaintiff for the defendant at his request.

The plaintiff's claim is for damages for fraudulent misrepresentations on the sale of a business.

as given in Foulke's Action in the Supreme Court. The defendant, before answering, may demand a fuller or more specific statement of claim.

The following is given, by the same author, as a sufficient demand:

The said defendant requires a statement of claim to be filed and delivered.

In the Rules of the Court it is provided:

2. In the indorsement required by Order II, Rule 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled.

3. The indorsement of claim shall be to the effect of such of the Forms in Appendix A, Part III, as shall be applicable to the case, or, if none be found applicable, then such other similarly concise form as the nature of the case may require.

* * * * *

6. In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable

by the defendant, with or without interest, arising (A) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (B) on a bond or contract under seal for payment of a liquidated amount of money; or (C) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (D) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (E) on a trust; or (F) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by a notice to quit, or against persons claiming under such tenant; the writ of summons may, at the option of the plaintiff, be especially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the Forms in Appendix C, Sec. IV, as shall be applicable to the case.

* * * * *

5. The Forms in Appendices C, D, and E, when applicable and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings, and where such forms are applicable and sufficient any longer forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be.

For convenience of reference, a set of pleadings taken from the Appendices to the Rules of the Supreme

Court, 1883, are set out in the Appendix [1] to this work. They will sufficiently show to what simplicity the forms of pleading have been reduced in England. They include the plaintiff's statement of his cause of action; the demand of the defendant for a more particular, or "special," statement, which the plaintiff may indorse on the summons in the first instance, without demand; the specific statement of claim; the defendant's "statement of defense," and the plaintiff's reply, which is a simple statement that he "joins issue upon the defendant's statement of defense."

As has been said, the Supreme Court, or certain of its judges, are authorized, by the Judicature Act, to "regulate the pleading, practice and procedure"; and in the exercise of that important function, the forms of pleading are prescribed.

If we turn from this method of regulating the forms of the pleadings, which leaves it open to the court itself to change and modify its rules as occasion requires, to the system that prevails in the States in this country of prescribing in general terms what the pleadings shall contain, and the practice and procedure, generally by legislative bodies, leaving the form to be devised by the lawyers, we are not greatly enamored of our system in comparison with that of England. To begin with, the codes of the States define the pleadings as

> The formal allegations by the parties of their respective claims and defenses for the judgment of the court

[1] Appendix G, p. 197.

or words to that effect, and the complaint is required to contain "a statement of the facts constituting the cause of action, in ordinary and concise language."

The answer must contain a general or specific denial of the material allegations of the complaint controverted by the defendant, and

a statement of any new matter constituting a defense or counterclaim.

The language quoted is taken from one of the State codes, but they are all alike in substance and effect where a system of code pleading is provided for.

In theory, no doubt, the pleadings provided for are the *"formal"* allegations of the litigating parties, but in practice they are very often about as *in*formal as the ingenuity of incompetent or negligent pleaders can make them. While the system which requires the pleader to state the *facts* constituting his cause of action, or defense, in plain and concise language is unobjectionable as a theory, experience and observation have proved that it has led to the greatest prolixity, verbosity, and uncertainty, and has added immensely to the delay and expense of litigation. The ability to distinguish between *facts* and evidence of the facts constituting the cause of action, or defense, has proved to be a rare quality, and the ability to state the facts "in plain and concise language" is not less rare.

It may be said that this is not the fault of the system. It is not, except that it calls for a kind and quality of pleading that not one lawyer out of a hundred is

capable of drawing in conformity to the requirements. This has been definitely and abundantly proved by experience. As a result of the inefficiency, ignorance, or carelessness of lawyers, a very large proportion of the time of the courts is taken up in the effort to construe and arrive at the meaning and effect of uncertain and ill-drawn pleadings, time that could have been saved, if fixed, or even more brief, forms of pleading had been provided for. It must be admitted that this would be unnecessary if the requirement of the codes were complied with; for the system does call for concise, and therefore brief, forms of pleading. But the trouble is that, after all, the form of the pleading and what it shall contain is left to the individual pleader in each case, and each individual makes his own form, according to his understanding, or belief of what constitutes a statement of the facts that make up his cause of action, or defense, and how much he must state, and in what way in order to meet the requirements of the code.

It is evident that the Parliament of Great Britain, by the Judicature Acts, endeavored to get rid of both the fixed and unchangeable forms of the common law and the great prolixity of the pleadings in Chancery. In this the Act itself and the Rules of the Court under it have, to a gratifying extent, succeeded. Something of the kind must be done in this country, if we are going to rid ourselves of the intolerable delays in the administration of the laws and the unbearable expenses of litigation that now prevail.

CHAPTER V

THE DEMURRER

THE demurrer deserves a separate and more specific consideration. It is a useless pleading, and should be abolished. This has already been done in England, and should be done as speedily as possible in this country.

The Rules of the English Court provide: *"No demurrer shall be allowed."* They further provide:

2. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court or a Judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

3. If, in the opinion of the Court or a Judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defense, set-off, counter-claim, or reply therein, the Court or Judge may thereupon dismiss the action or make such other order therein as may be just.

This effectually disposes of the demurrer. Its abolition removes one of the most effective instruments of delay in the administration of justice.

Under the codes, the party, either plaintiff or defendant, is given a specific time within which to demur or answer the pleading of his adversary. If the client seeks delay, and his attorney is willing to aid him in his purpose in this illegitimate way, or the attorney himself for any reason wants further time, he files a demurrer, without regard to its merits. This stays further proceedings, until the court is able to hear the demurrer. Generally the demurrer is not pressed, because the attorney has accomplished what he wanted: delay. If the demurrer is presented and the court finds the pleading against which it is directed insufficient in law, or defective, leave is given to amend it within a fixed time,—usually not less than ten days,—and when amended, if opposing counsel is still seeking delay, another demurrer is filed, and the process is repeated.

Not infrequently, when a demurrer is presented the court takes it under advisement. In this way the delay is often increased for an indefinite length of time. Oftener than not demurrers are filed to gain time and for nothing else. The substitute for it, under the English practice, is very simple and effective. The point that the pleading is insufficient is made in the adverse pleading; as, for example, in the answer. In the form prescribed in the Rules of Court the objection is made in this general language, contained in and made a part of the defendant's answer:

> The defendant will object that the special damage stated is not sufficient in point of law to sustain the action.

And, of course, this general objection may be made as to the sufficiency in point of law to the *whole* complaint, and in any form of action. The great advantage of this form of pleading and procedure is that it eliminates one unnecessary pleading, with its misuse and consequent delays, and presents the question of law in the main proceeding, which the court may or may not stop to consider and determine before hearing the case on the facts.

There is but one effective remedy for the law's delays resulting from the use of the demurrer for that purpose, and that is its entire abolition. Judges and lawyers are prone to hang on to pleadings under which they have been practicing; but if we are to bring about any reform worth while, in the attempt to lessen the cost of litigation and expedite the business of the courts, we must be willing to surrender some of our old ideas and to accept new ones that lead to this most desirable consummation.

CHAPTER VI

EMPANELING JURIES

To say nothing of the wrongs inflicted on jurors by the examination of them to determine their fitness to serve as such, and their imprisonment during the trial of cases, the time wasted in such examinations adds greatly to the delay of cases and the expenses of litigation. This results mainly from the abuse of the rights and privileges of attorneys and of discretion on the part of judges.

The examination of a juror is no longer confined to questions relating to his fitness or qualifications to serve on the present jury. The attorneys, under the guise of endeavoring to determine his qualification to serve on the jury, are permitted, without reason or justice, to inquire with the utmost minuteness into his life, his history, and every act and circumstance of his past, without reference to the question whether or not such inquiry relates to any fact in his life bearing upon his fitness to serve on the jury. Such an examination is an unwarranted abuse of the powers and prerogatives of the court, and a flagrant violation of the rights of the juror. Besides the wrong and injustice this entails upon the juror, it is one of the most flagrant and inexcusable causes of the law's delays.

This is an abuse of modern growth. It was un-

known in earlier times. Fifty years ago such an infringement on the rights of a man called to serve on a jury was unknown. By this minute and unwarranted examination of jurors, weeks of time are frequently consumed in empaneling one jury. This excessive waste of time is by no means uncommon in these latter days. This, again, is not the fault of the law. It results, mainly, from the election of incompetent or over-indulgent judges, who consider very lightly their duty to the public, and have very little regard for the rights and feelings of men called to serve as jurors.

To add to the wrongs committed on the jurors when they have passed this merciless and uncalled-for examination, they are deprived of their liberties and locked up, in charge of an officer, and kept *incommunicado* until the end of the trial. It is a barbarous practice, and one that adds immensely not so much to delay as to the expense of litigation. And, strange as it may seem, this deprivation of the liberties of juries is imposed on the mere request of either of the parties to the action, and almost as a matter of course.

This is certainly a matter of discretion on the part of the court, and the practice of locking up juries should be abolished at once. Better far that justice should sometimes go astray through outside influences than that such an objectionable practice shall prevail!

After all, the one and only effective reform in this branch of the practice is to abolish the jury system altogether; and the sooner this is done the better, not only as a saving of expense but as a step towards a better and safer administration of justice.

CHAPTER VII

EXAMINATION OF WITNESSES

THE taking of evidence in courts of justice, as the trial of cases is now generally conducted, is the source of inordinate and unnecessary delay. This results very largely from the failure of judges to limit, restrain, and control the examination of witnesses. Cross-examinations particularly, are permitted to consume hours of time, when minutes should be, and are in most cases, entirely sufficient to meet the needs of opposing counsel in the attempt to test the knowledge, honesty, and fairness of the witness, and the accuracy of his statement on direct examination.

Of course, there are instances where the witness appears to be an interested or hostile one, or where there is reason to test the truth of what he has said on direct examination, when very great latitude should be allowed in the cross-examination. In this case the presiding judge should exercise a very liberal discretion. But such cases are very rare. The custom of lawyers, very generally, in conducting a cross-examination, is to commence at the beginning of the story as told by the witness on his direct examination and follow it through to the end with the hope, apparently, that he may tell the story a little differently

on the second statement of it, thus weakening his testimony. One would think that a very few efforts of that kind would convince an attorney how futile such a cross-examination is, and what a waste of time results from it. But most of them never learn this lesson.

The ability to cross-examine a witness skillfully and without waste of time is a very rare accomplishment. It is believed that more lawyers fail of success in this branch of the work, important as it is, than in any other. The necessary skill in the cross-examination of a witness cannot be attained by the reading of books. It is, to a very great extent, a gift. There is no disposition here to minimize or belittle the importance of the cross-examination of a witness, properly and intelligently conducted. It is one of the most effective means of confounding the dishonest witness, aiding the honest but inefficient one, and sifting out the general statement made on direct examination, the material facts, and bringing out of the whole case the real truth as it is reflected in the minds of the witnesses.

Most of the cross-examinations, however, that one hears in courts of justice these days are tales retold substantially as they were told on the direct examination. Such cross-examinations are not only useless and unnecessary but often they simply strengthen and amplify the story first told by the witness and make stronger the case of the adversary. Again, the usual cross-examination goes into useless details, wearies the court or jury, makes more voluminous the record

of the evidence, increases the expenses of the trial, and adds immensely to the delay in presenting the case. To the experienced judge who knows how a cross-examination should be conducted and how results may be reached, this is a painful, soul-harrowing process; but most judges, instead of controlling and limiting cross-examinations, as they should, in the public interests, sit through days of wasted time, take their punishment, and leave litigants and taxpayers to suffer the effects of either their indolence or lack of capacity to deal with this important subject.

A cross-examination should be concise, without waste of words, confined to the material statements of the witness on his direct examination, and directed at the weak spots in the witness' testimony; and this should be done with care and skill. Many good cases have been lost by unskillful and indiscreet cross-examinations. To call for a repetition of what has already been said by the witness, to insist upon the bringing out of greater details, and refreshing the recollection of the witness by leading questions not allowed in the direct examination will more often than not make the case of the adverse party clearer and stronger.

The waste of time in taking testimony is not confined to the cross-examination of witnesses. The direct examination is often painfully prolix and a useless waste of time. This results, sometimes, from the dullness of the witness, or his inability to tell what he knows, but more frequently from the inability of the attorney, by direct and concise questions, to ex-

tract from the witness the facts within his knowledge. One often writhes under an awkward examination of a witness, and suffers from the loss of time resulting in this way.

A very great part of this loss of time and mangling of cases can be prevented by a reasonable degree of firmness on the part of a competent and intelligent judge who knows how the examination of a witness should be conducted. A judge has no right to sit supinely by and see time wasted in any such way. He has the power, and it is his duty so to control the taking of testimony as to reduce this waste of time to a minimum. If judges would only do this, there would be far less complaint about the law's delays.

One of the causes of the over-examination of witnesses, and consequent swelling of the trial records, has been the advent of the shorthand man and the typewriter. It is altogether too easy now to take down and transcribe what is said. The quantity of it has ceased to be important. In his early experience the author practiced law in a small town in Indiana where the shorthand reporter and the typewriter were unknown. The judge held court in several counties, and terms of court a few weeks in length were held, at intervals, each year. In those times a case that, under present conditions, particularly in large cities, will consume a week in its trial, would be tried easily in one or two days, and better and more satisfactorily tried than under the present practice.

There is no excuse for these long trials. Judges can and should prevent them. The people have a just right

to complain that they do not do so. While such practices are allowed, there is little use of long dissertations on judicial reforms or amendments of statutes. Infinitely more can be done to put an end to the disgraceful, unnecessary, and expensive law's delays by the right kind of judges than by any reform legislation that can be enacted; and the lawyers composing Bar Associations, who are recommending reform legislation, can much better serve the interests of their clients and of the public by reforming their own methods of practice, under the law as it is, than by any so-called "reform legislation" that they are so earnestly seeking to bring about. There is no law that makes it incumbent on an attorney to consume days in the examination, or cross-examination, of a witness that could be bettter and more effectively concluded within an hour, or less.

So of many other unnecessary and unwarranted encroachments upon the time of the court in the trial of cases. These delays are inexcusable under the present laws. They would not be helped by any reform legislation that has been recommended by lawyers who are, while advocating changes, doing the very things that make for delay, and who will probably continue to do so, no matter what changes in practice and procedure may be made by law.

This deplorable condition does not, as a rule, result from any intention of judges to either violate or neglect their duties. It has become a habit, a custom. But it is a custom that every good judge should be ardently seeking to destroy.

CHAPTER VIII

TAKING CASES UNDER ADVISEMENT

THE unfortunate custom, now so common, of judges' taking cases under advisement is adding immensely and unnecessarily to the law's delays. This is particularly true in the case of trial courts; but the objection to it applies only in a lesser degree to the appellate courts. If a case is tried by a jury, it must be decided at once. Why should this not be so if tried by a judge? It is rather a reflection on our judges to admit that they are unable to decide a case without delay as accurately and intelligently as twelve men unaccustomed to consider and weigh evidence, and uneducated in the law.

The habit of withholding their decisions, now so general with the judges, is entirely unnecessary and without reasonable excuse. It may be fairly said that a judge is better able to decide a case correctly upon the instant it is concluded than at any later time. The evidence and the arguments of counsel are fresh in his mind, nothing has intervened to cloud his mind or distract his attention from it. It is believed that cases would be better decided, and fewer errors committed resulting in reversals and retrials, if no case were ever taken under advisement. There is some-

thing wrong with a judge who is unable to act promptly and intelligently on a case the moment the trial is concluded. Besides, such a judge is doing himself an injury, and lessening his usefulness as a judge, by allowing himself to think that he is unable to make prompt decisions of a case. It is begetting in himself a doubt of his ability to do the thing that every judge is obligated to do,—administer justice, not only accurately but fearlessly and without delay. Justice delayed is often justice denied. A judge should never admit to himself that he is not able to administer justice at the time when it should be administered. It is an admission of weakness and incapacity that goes far to destroy confidence in himself and render him less efficient in the performance of his duties.

There are other serious objections to this custom of taking cases under advisement. It adds very greatly to the labors of the judge, and also adds materially to the expenses of litigation, both to litigants and to the States. The judge who defers the decision of the case must practically retry it, if there was any good reason for his taking that course. It must be necessary in that event for him to review the evidence, which necessitates the expense of having the shorthand notes of the evidence transcribed, often entailing very heavy expense; and much of the time of the judge which should be devoted to the trial of other cases is consumed in the unnecessary retrial in his own mind of the case under advisement. It is not unusual for judges to hold cases in this way for weeks and even months, with the undecided cases accumulating on

their hands. The evil of this has become so great that, in some of the States, it has been provided by law that no judge shall be paid his salary until all cases submitted for ninety days,—or some other fixed time,—shall have been decided. Even this salutary spur to more prompt action has been avoided, in some cases, by an order of the court setting aside the submission of the case, or procuring a stipulation of counsel,—which, of course, they dare not refuse,—that the submission be set aside and the case resubmitted as of a later date, in order to allow the judges to draw their salaries.

Good judges,—able conpetent, and prompt judges,—cannot be made by reforming the laws. If a judge is afraid of himself, and acknowledges that he is not capable of deciding a case at the proper time, you cannot put courage into him by an act of the legislature. What is needed in this case is a reform of the judges, not of the law.

What is said here relates more particularly to decisions upon the evidence, or issues of facts. But the same is true, in greater or less degree, in respect to decisions upon the law of the case. This will be considered more specifically under the chapter on "Briefs," which follows.

CHAPTER IX

BRIEFS

THE filing of briefs, especially in the trial courts, is another most prolific and unnecessary cause of delay. No such thing should be allowed after the trial of a case. Judges should insist that the attorneys submit at the trial their views of the law, not afterwards; and no case should be continued, or taken under advisement, to allow an attorney to do after the trial what it was his duty to the court, to his client, and to the public to do before, or at, the trial. To allow delays for such a purpose, or reason, is to cultivate in the minds of both courts and attorneys an unfortunate condition of slothfulness, indolence, and inefficiency that can find no excuse.

It is not unusual for courts to give time, after a case has been tried, for counsel in a case to file briefs, extending over weeks of time; and the attorneys are allowed to extend the time given still longer, as they see fit. Besides the loss of time such a practice involves, it is a demoralizing practice that should not be tolerated. While the judge is waiting for the briefs to come in, the facts of the case and the evidence heard at the trial have, in great measure, passed out of his mind; the evidence must be transcribed for his

use, he must go over the whole case the second time, if he does his duty, costs are largely increased, while the parties to the litigation are waiting for the adjudication of their case, which they were entitled to have promptly at the end of the trial. The attorney must have his facts and the evidence to support them ready for submission at the trial. What reason is there for allowing him additional time to present his views of the law of the case, with his authorities to support them at the same time? The careful and prudent lawyer will brief both the law and the evidence in his case before the trial, and be ready to present them both then promptly and without delay. This was in earlier times quite the common practice. It was a sign of efficiency on the part of the attorney. Now it has fallen into disuse, because the courts graciously overlook his neglect and inefficiency, and give him time to perform this important duty at his leisure. And when the briefs come in they are generally the citation of a mass of authorities, supposed to sustain the attorney's case,—often very few, if any of them, in point,—and the judge must do what the attorney should have done at the trial: sift them out and try to arrive at the principle that should control his decision.

In these times, however, cases generally are not presented or decided on reason, or principle, but upon authorities,—the decisions of other courts, that have gone before. The decided cases have so increased in number and the opinions of the courts have so increased in length, resulting from the citation of and quotations from previous opinions, that the attempt

to ascertain what is the true principle or rule of law that should control the case is a hurculean task. The brief, as a rule, is a compilation, or digest, of as many of these thousands of cases as the attorney regards as sufficient to support his case. Often he does not stop to reason about it, or to ascertain why, or upon what principle, the cases cited by him were decided. He simply says to the court having his case in hand: "Certain other courts have decided this way, and therefore you should do the same thing." And too often, courts acquiesce in this estimate of their duties and obligations, and decide their cases accordingly.

As a result of all this we have "case" lawyers and "case" judges. Cases are not presented or decided upon reason, or principle, but upon authorities. The lawyer, or the judge, is no longer a reasoning being but a grubber after decided cases that have been presented and decided by other unreasoning grubbers after other decided cases of a like kind.

This unfortunate condition of things has done much to reduce the previously high standards of the profession and to bring into it, in large numbers, men who have little ability and capacity to perform the important duties of the profession. Nor have the courts escaped the deteriorating influences and effects of this way of performing their duties. We often hear the thought expressed by competent and observing lawyers and judges that it would be better for the profession, and better for the public interests, if all the decisions of all the courts in the world were brought together in one immense pile and burned.

This is, of course, an extravagant view to take of the matter; for there are some opinions and decisions of the courts worthy of preservation for all time. Nevertheless, the thought has its foundation in reason and experience. This phase of the subject will be further considered when we come to deal with the subject of "Written Opinions" by the courts.

CHAPTER X

WRITTEN OPINIONS

THE vast accumulation and rapid increase of opinions and decisions of the courts and the consequent delays and other injurious effects of this condition have been adverted to in considering the question of "Briefs." The subject deserves a more extended consideration in this connection. It is not only the number of the opinions rendered but the nature and quality of them that should excite concern.

A careful study of the decided cases proves that, in many of them, the courts have made no effort to ascertain upon what principle a given rule of law affecting the question should be maintained or overthrown, but have contented themselves with laying down, or discarding, the rule and citing other cases in which the same thing has been done in the same way. So we have the number of cases for and against a given proposition rising in columns higher and higher; the true or accepted rule depending, too often, upon the height of one column or the other, or the weight of authority *according to numbers* for or against it. Such authorities are worth nothing either to the student or the practitioner, except when he appears before a court which is controlled by this peculiar, not

to say unfortunate, rule of deciding cases by such a test of the weight of authority, when his diligence in unearthing more of the decided cases than his opponent is sure to bring him success.

The intelligent lawyer looks for something better than this, searches for the guiding principle that should sustain him, and hopes to convince the court, not by authorities alone, but by reason allied with authority. The gravity of the situation, as viewed by the leading lawyers of the country, may be gathered from the following memorial of the American Bar Association to the courts of the country:

The American Bar Association, as representative of all branches of the legal profession in America, and with conscious pride in the manner in which American courts have discharged and are discharging their judicial duties, ventures, in a spirit not of criticism, but of co-operation, to address to the courts of the country whose opinions are reported in the books the following memorial:

For many years the accumulation of reported cases which form our body of legal precedent has been the subject of grave concern. The acceleration in their numbers in recent years is such as to create alarm. More than 11,500 volumes of American reports are now extant, and those published within the last 30 years exceed in number the total for all the years preceding. In our system of state and federal governments we have far more courts of last resort than any other people have, and with the growth of population litigation in all these courts must increase in like proportion. Unless, therefore, the problem is seriously attacked it is not improb-

able that in the near future the burden of accumulated precedent will become not only serious, but insupportable. Indeed, it may ultimately jeopardize our whole theory of customary, as distinguished from codified law, and may impair, if not destroy, our doctrine of the sanctity of judicial precedent.

The American Bar Association recognizes the joint interest of the Bench and Bar in the premises, and does not minimize the share of the Bar in the responsibility for the evil nor its duty to coöperate in applying the remedy. It believes, however, that the matter is one for the especial cognizance of the judiciary and that no effort at reform, whether it come from the profession itself or from the legislative branch of the government, can be so effective as those remedies which judicial initiative alone can supply.

With a deep sense of the gravity of the situation the Association is impelled, therefore, to approach the courts of the country and to urge that they seriously address themselves to the problem presented. In so doing criticism is foreign to its intent and censorship beyond its power. Certain concrete steps may be referred to because they have been so often discussed that they may be treated as representing the common judgment of the profession. There are: (a) A conscious effort at the shortening of opinions and the recognition of brevity as a cardinal virtue second only to clearness; (b) an avoidance of multiplied citations and of elaborate discussions of well-settled legal principles and of lengthy extracts from text-books and earlier opinions; (c) the presentation of so much, and no more, of the facts as are necessary to present the precise question at issue; (d) a reduction of the number of reasoned opinions and

a corresponding increase in the number of memorandum or percuriam decisions, with a brief statement, when necessary, of the points decided and of the ruling authorities.

To such efforts as may be made in pursuit of this and similar reforms, the Association, speaking for itself and its membership, pledges to the judiciary its hearty support.

It is singular that this memorial should recommend the "reduction of the number of *reasoned* opinions," when the well-reasoned opinions are generally regarded by educated lawyers as the most valuable and the most worthy of preservation. It is the great mass of citations of and quotations from other decisions that is greatly to be deplored. These things can be had by reference to the digests.

This problem of too many and too voluminous opinions has been under consideration by the American and other Bar Associations now for years, but, so far as one can see, nothing tangible or practical has come of it. Nothing of value will be done about it until the judges of the courts of the country realize the gravity of the situation sufficiently to overcome their propensity to write opinions where none at all are necessary, or beneficial; to write long opinions where short ones would serve the interest of litigants as well and the public interests much better; and, especially, until they master the growing tendency to quote at length, from earlier opinions, matter that can be just as well read from the original, and to cite many cases

where one, or a very few, would answer the same purpose.

Unless the lawmakers go to the extent of prescribing the kind, number, and quality of opinions to be delivered by the court, which would be impracticable and unfortunate, this is a reform that can be brought about by the courts alone. Therefore, the responsibility for the continuance of this evil must rest with them. The capacity to express one's views in few words, concisely and clearly, is a rare faculty and one that seems to belong to judges and lawyers more rarely than to most men. To most of them it belongs not at all. It is, however, a faculty that can be vastly improved by education and practice. But the effort to improve, in this respect, seems to be as foreign to the average judge and lawyer as the faculty itself. So the outlook for better things in the way of court opinions is far from promising. Yet it is evidently one of the greatest evils and one the most calculated to add to the law's delays and the expense of litigation that exists at this time.

What has been said applies to opinions delivered by appellate courts, where opinions are authorized by law, and decisions that are authoritative and binding not only in the case in which they are delivered but generally as fixing the law on a given point. Too many and too long opinions, coming from such courts, are unfortunate and unnecessary. But what shall be said of the growing tendency and practice of trial courts, whose opinions bind nobody, and are not binding as authority on any question? They are very

rarely read, it is assumed, by any one except the attorneys for the parties to the action: one to approve, because it decides the case his way; the other to condemn, because it does not. All this consumes time and adds to the expense.

To enable the judge who is ambitious to declare himself in writing and in print, he must take the case under advisement, often for weeks, until he can find time to write such an opinion as will reflect credit on the court. Thus, he devotes time and painstaking labor to the preparation of an unnecessary opinion, time that should be devoted to the trial and disposition of other cases waiting to be heard. The labor bestowed on the preparation of such opinions is a pure waste of time, in respect of the public interests, or even of the interests of the parties to the action. It may be educational to the judge, but he should be educated before coming to the bench.

It is a practice that should be discouraged by practicing attorneys and condemned by public opinion. Indeed, the people of the country who are neither lawyers nor litigants should be made to understand that their interests are being violated and their taxes increased by such practices, and no one benefited; and litigants waiting to be heard should be informed that their cases are being held up and their rights jeopardized, while some judge, who should try them promptly, is wasting his time and delaying their cases in writing opinions in other cases as well as their own, which should have been decided and out of the way weeks, sometimes months, before. They should

be made to know that if this were not so they would have to pay the salaries of a far smaller number of judges, and legal business would be far more promptly, accurately, and satisfactorily disposed of.

CHAPTER XI

FINDINGS

In most of the States the making of special findings and conclusions of law by the court is made compulsory; in others they may be demanded by either party to the action. For this, of course, neither judges nor attorneys are responsible, unless it remain optional with them to ask for findings or not.

Laws requiring such findings should be repealed, and findings abolished. They have been a most prolific source of delay, and have brought about the reversal,—on appeal and retrial,—of many cases on purely technical questions relating to the findings, and in no way affecting the merits of the judgment appealed from. One wise California Justice of the Supreme Court, when forced to reverse a case because of the failure of the trial court to find on one of the issues of fact, declared, in a state of exasperation, that all findings were good for was to reverse cases. The statement was not an extravagant one. That, as a rule, is just what they are used for. Besides this, cases are frequently delayed for weeks after the case is decided, to enable counsel to prepare the findings, the court to settle and sign them. It is intended by the law that the judge of the court should prepare the

findings; but this is rarely done. The labor is generally imposed upon the attorney for the successful party. He, of course, makes them as favorable to his client as possible, in order that they may fully sustain the judgment. When he proposes them for the consideration of the judge, the opposing counsel may object to any findings proposed and offer additional ones and amendments to those proposed. Thus an issue is formed for the court to try. It is no exaggeration to say that, in many cases, it takes as long to prepare and settle the findings as it has, or should have taken, to try and decide the case. It adds materially both to the time taken in the trial and disposition of cases and to the costs and expenses of litigation.

In addition to this, the reports of the decisions of the courts on appeal are filled with, literally, thousands of cases devoted, in whole or in part, to questions arising on the sufficiency and effect of the findings. The whole system of findings and conclusions of law is a useless excrescence on the body of the laws of practice and pleading that should be promptly and effectively removed.

It is an anomalous condition of things that a jury may decide a case by a general verdict for one of the parties against the other, and a judgment be founded upon this general finding, while a judge who tries the case must make special findings and conclusions of law to uphold any judgment he may render; and if he fails to find on a single one of the material issues, or, in the opinion of the appellate court, finds wrongly upon any

issue, the judgment must be reversed and the case retried. Thus it is held that

> It is settled beyond controversy that it is the duty of the court to find on all the material issues, and a failure, in that respect, is ground for a new trial as a "decision against law."

And again

> Judgment based upon findings which do not determine all such issues, is in our opinion "a decision against law" for which a new trial may be had. In such case a reëxamination of the facts becomes necessary in order that the issues of fact may be determined.

This single quotation from the many cases decided on the subject shows the extent to which the courts have gone in enforcing the laws requiring such findings, the strictness with which the law is maintained, and the firmness with which the courts uphold the necessity of finding on all the issues.

In this instance the courts have no choice. No matter how unnecessary and superfluous findings may seem in a given case, unless they are waived by the parties to the suit, they must be made. It is a condition that, in the interest of the speedy administration of the laws and in the public interest, should be remedied by legislation, and that without delay.

CHAPTER XII

CONTINUANCES

THE numerous and unnecessary continuance of demurrers, preliminary motions of all kinds, and of the trial of cases, constitute a constant trial to a judge who believes in prompt action and the speedy disposition of cases. To the indifferent judges, of whom we have far too many, it is a matter of no concern. To litigants, whose interests are often greatly affected by indolent or procrastinating lawyers who are all too ready to continue cases for their own convenience, it is a matter of grave importance, and the public interests are affected as such continuances delay the administration of justice and add materially to the cost to the taxpayers of maintaining the courts.

Professional courtesy enters very largely into this phase of the law's delays. A lawyer, very naturally, likes to accommodate opposing counsel, and will, for that reason, give additional time to plead, or take other steps required by law, without any showing of a necessity for taking this extra time not allowed by law; and the judges, with a like good-natured desire to accommodate attorneys, for that purpose jeopardize the public interest, and often the interests of the litigating parties themselves, by consenting to these unneces-

sary delays. Besides, the attorney who lacks the qualification of promptness in looking after the interests of his clients, when asked to consent to continuances, reasons with himself that directly he may be asking a like favor, and if he expects leniency in this respect, he must grant favors to others.

It is a bad practice. It educates lawyers, especially young lawyers, to procrastinate and evade the law that very properly and justly limits the time within which to take the different steps necessary, on his part, to bring a case to trial. As we have seen, such a lawyer, in order to give himself more time than the law allows, files a demurrer, knowing it to be unfounded, simply to gain more time. This is a plain violation of his duty as an attorney. It is his duty, not only in the interest of his client, if he has a just cause of action or a meritorious defense, but in the public interest as well, to bring the case to trial without delay, at least within the time provided by law. It is equally the duty of the judge to see that this is done. Every continuance procured by an attorney and allowed by the court, without a valid and just cause, is a violation of the letter and the spirit of the law that limits the time within which a case must be brought to issue and trial, by fixing the time within which each step to that end must be taken. Promptness on the part of attorneys and proper firmness on the part of the judges, in this respect, would immensely facilitate the transaction of legal business and save much of the money that is expended in maintaining the courts.

The people do not realize how much of their money is wasted, and the time of their public officials taken up, in the unnecessary continuance of cases. If they did there would soon be an enforced judicial reform much more effective than the amendment of our laws of practice and procedure or the enactment of new ones.

These unnecessary extensions of time, and useless continuances, form one of the worst evils,—one most conducive to delay and the increase of expenses,—that now afflict a tax-ridden people. It is one that the courts can, if they will, very greatly mitigate. A moderate degree of attention to this dilatory and slothful practice on the part of attorneys, and a proper degree of firmness and discretion on the part of the judges, would work wonders in this respect.

The remedy for it rests very much within the power of the courts. No continuance, by the mere stipulation or consent of the attorneys, should be allowed, and none should be granted by the court, without a proper showing of a good and valid reason therefor. The court should insist upon a compliance with the laws limiting the time within which the successive steps necessary to bring a case to trial shall be taken; and if this is not done, the case, if the attorney of the plaintiff is at fault, should be dismissed; while, if the fault lies with the attorney for the defense, default should be entered against his client, and the case proceeded with. If the laws do not authorize such action by the court, the law should be amended and the

power given. The judges seem to forget that they owe a duty to the public, to enforce prompt and speedy action on the part of lawyers and all officers of the court, themselves included.

CHAPTER XIII

APPEALS

BEFORE entering upon a discussion of the practice and procedure in the matter of appeals, and the reforms needed in this branch of the law, it should be said that there are altogether too many appeals taken, many of them for improper purposes and not in the interest of justice, some for delay, many of them groundless, even frivolous. For this, doubtless, lawyers are most to blame. Appeals are encouraged and advised by incompetent and designing lawyers, who should themselves be penalized. In some of the States penalties may be imposed by the appellate court for frivolous appeals; but when this is done, the burden falls on the client and not on the attorney who has induced him to take this step.

The contrast between the English Judicature Act and the State Codes in the matter of procedure is probably as great in providing for the practice on appeal as in any other particular. The rules of the Supreme Court, which constitute the code of procedure under the English system, provide for an appeal as follows:

1. All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of

motion in a summary way, *and no petition, case or other formal proceeding other than such notice of motion shall be necessary.* The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.

It is further provided that

it shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal but if he intends, upon the hearing, to contend that the decision of the court below should be varied he shall give notice of such intention to adverse parties.

The Act provides further:

The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals.

No bill of exceptions is required, and proceedings in error are abolished. It is further provided:

When any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows:

(a) As to any evidence taken by affidavit, by the

production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed:

(b) As to any evidence given orally, by the production of a copy of the Judge's notes, or such other materials as the Court may deem expedient.

It is held, however, that under this provision it is the duty of the appellant to bring before the Court of Appeal the whole of the evidence, oral as well as written, on which the order appealed from was founded. And the Court of Appeal is authorized to order the whole or any part of the evidence printed, but either party printing the evidence without such an order must pay the expense of the printing.

This practice is very similar to the practice prevailing in the Federal court in appeals in equity cases. But there the clerk of the court certifies up to the appellate court a complete transcript of the proceedings in the court below, including the evidence. This involves great and often unnecessary expense. Often a very small portion of the proceedings, especially of the evidence, would serve every purpose, lessen the labors of the appellate court, and save the parties great expense.

In common law cases, the old proceeding by way of writs of error and assignments of error is still retained in the Federal courts. Appeals in equity cases are much more simple but, as a rule, they are far more expensive. The court, in allowing a bill of exceptions, may avoid an unnecessarily voluminous record on ap-

peal by including in it only so much of the evidence and other proceedings as are necessary to present the case made by the assignment of errors, fully and fairly, to the appellate court.

The codes of the various States have not improved the practice on appeal. They have,—or most of them have,—abolished writs of error and substituted appeals in their stead. But they still require bills of exceptions, or, in some States, "Statements of the Case" which are in effect the same. The proceeding is a very laborious, cumbersome, and expensive one, and involves a great deal of unnecessary delay. In California an alternative method of taking an appeal is provided for, under which the complaining party may take the case up by filing with the clerk of the trial court a notice of appeal. No notice to the adverse party is required. It is made the duty of the clerk, upon the filing of the notice, to certify up to the court to which the appeal is taken a full and complete transcript of the proceedings in the court below. In this it will be seen that the practice is very similar to the English practice. Two appeals are provided for: one from the judgment and the other from the order of the court granting or denying a new trial. On an appeal from the judgment, the evidence need not go up; but in case of an appeal from an order granting, or denying, a new trial, it must.

Two appeals are wholly unnecessary. An appeal from the judgment, which depends not only upon the sufficiency of the pleadings and other questions of law but upon the evidence as well, should be made to test

all questions arising at the trial, including the sufficiency of the evidence to support the judgment.

By way of comparison of the practice on appeal under the English Judicature Act, and Rules of Court, above mentioned, and the Codes of the several States in this country, a few of the sections of the Code of Civil Procedure of California are here quoted:

§ 940. APPEAL, HOW TAKEN. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing.

§ 941. UNDERTAKING OR DEPOSIT ON APPEAL. The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.

* * * * *

§ 947. UNDERTAKING MAY BE IN ONE INSTRUMENT OR SEVERAL. The undertakings prescribed by section nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three,

and nine hundred and forty-five, may be in one instrument or several, at the option of the appellant.

* * * * *

§ 950. WHAT PAPERS TO BE USED ON AN APPEAL FROM THE JUDGMENT. On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for a new trial or settled after decision of such motion when the motion is made upon the minutes of the court, as provided in section six hundred and sixty-one, or any bill of exceptions settled, as provided in section six hundred and forty-nine or six hundred and fifty, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial.

§ 951. WHAT PAPERS USED ON APPEALS FROM ORDERS, EXCEPT ORDERS GRANTING OR REFUSING NEW TRIALS. On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.

§ 952. WHAT PAPERS TO BE USED ON AN APPEAL FROM AN ORDER GRANTING OR REFUSING A NEW TRIAL. On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section six hundred and sixty-one of this code.

§ 953. COPIES AND UNDERTAKINGS, HOW CERTIFIED. The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or a stipulation of the parties waiving an undertaking.

Specific provision is made for forms of undertakings in different kinds of cases; for example, from a judgment directing the execution of a conveyance, and concerning real property, and where a stay of proceedings is asked for.

Of course, the State codes are not all alike, but the California procedure will very well illustrate the general form and effect of appellate procedure in the State courts in this country. They are certainly bad enough. The various steps required and allowed to be taken in removing a case to the appellate court, consume an immense amount of time and call for much unnecessary labor and expense. The attempt in California to remedy this condition by the alternative method of appeal, above mentioned, was a step in the right direction; but it seems to be favored by neither the appellate courts nor the lawyers. Under the rules of the Supreme Court of the State, the record on appeal must be printed for the convenience of the court, which involves great expense. Under the alternative appeal system the whole record need not be printed, but counsel must print in their briefs so much of the evidence, and other matter in the record, as they rely

upon to sustain their positions, which is much the same thing.

There is another question of grave importance in the matter of appeals, namely: *For what errors committed by the court below must a judgment be reversed?* This question has been given much and very serious attention by both judges and lawyers, with a view to limiting causes of reversal on appeal to errors going to the merits of the controversy between the parties, preventing the appeal of actions on technical grounds not going to the merits, and reducing the number of retrials. Efforts in this direction have borne good fruit. In California it is provided in the Code of Civil Procedure:

Sec. 475. NO ERROR OR DEFECT TO BE REGARDED UNLESS IT AFFECTS SUBSTANTIAL RIGHTS. The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.

And, in order to make this desirable reform secure it was, in 1914, carried into the State Constitution in the following words:

Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Similar provisions will be found in other States.

Unfortunately, the courts have shown a disposition to give these wholesome provisions a very narrow construction, and many cases have been reversed which should have been affirmed under these restrictions upon, or limitations of, the powers of the courts.

The vast increase in litigation, particularly in the Western States, should insure the enforcement of these provisions in a broader sense. The courts should, of course, confine their effects to errors not affecting the merits of the controversy; but they should not hunt for opportunities to reverse cases, unless it is clearly apparent that the complainant has been substantially injured by the decision of the court below. Indeed, it is quite a matter of question whether it would not be better to limit very considerably the right of appeal, if not to take it away, and in most cases confine the parties to an adjudication by one court.

Appeals are not matters of right. The privilege is

one given by statute, and might very well be limited. But if appeals are allowed at all, it will be difficult to determine what cases may and what may not be appealed. It would not do to confine it to the smaller or less important cases. That would at once be looked upon as a discrimination against the poor man, in favor of the rich and powerful,—and not without reason. It would be difficult, also, to divide appealable and non-appealable cases into classes, depending upon the nature of the claims involved.

It is questionable whether justice would not be better served, on the whole and in the long run, if the right of appeal were taken away altogether. This would be a tremendous revolution in the administration of justice, but the immense burdens of time and expense brought about by the appeal of cases, a burden that seems to be growing heavier as time goes on, may force this reform.

A comparatively small proportion of the cases appealed are reversed, and the enormous cost, not only to the public but to litigants, in the aggregate resulting from unsuccessful appeals, may well be set off against the gain to litigants who succeed in the appellate courts, especially when it is considered that, in many of the cases reversed, the successful party on the appeal becomes again the losing party on a second trial. To this must be added the fact that an appellate court is not infallible, and the court below may have been right and the appellate court wrong. Unquestionably this is often so.

So, all things taken into account, the taking away

of the right of appeal would not be so serious a matter, after all. Litigation must end somewhere, and why not with one trial, or the decision of one court, as well as two?

CHAPTER XIV

RULES OF COURT

THE question whether rules of practice and procedure should be made by legislative enactment or by the courts has been agitated for a long time by lawyers, by judges, and by numerous civic bodies throughout the country. To establish such rules by legislation, as has been done up to this time, leads to greater stability, while to commit this important function to the courts will make the practice more flexible and more readily changeable when experience demonstrates that alterations are necessary to the satisfactory and speedy administration of justice.

Both of these methods of controlling the practice have their advantages, no doubt, but we have tried the legislative method ever since the Government came into existence and it has, in many ways, been found wanting. But it must be remembered, when we propose to turn this most important work over to judges and lawyers, that it was almost entirely they who abandoned the old common law and equity systems of practice and gave us in its stead the hybrid one of code practice and procedure, which has multiplied the decided cases on the subject manyfold, and added enormously to the expense of litigation. The reports

of the decided cases have been swelled to alarming proportions by decisions made necessary by the continuous and apparently unending efforts to understand and construe the codes of practice and procedure. Law-making bodies are composed mainly of lawyers, who exercise controlling influence in all legislation, particularly legislation relating to this subject. They have been tinkering with and amending the codes from the time New York first entered upon this field of reform legislation, usually making them longer and more complicated and more difficult to understand than they were in the beginning. It is proposed now to turn over to these same influences the unlimited power to fix and determine what our practice and procedure, in the courts, shall be.

It is a great step that should not be taken without careful and earnest consideration and deliberate care. As we have seen, the step has been taken by England. As we have already seen, by the Judicature Act, the court, or certain judges thereof, are authorized, by order in council, made on their recommendation, to to make rules "for regulating the pleading, practice and procedure in the High Court of Justice and Court of Appeal." It should be remembered that the two courts mentioned are parts or divisions of the one consolidated or unified court provided for in the Act. If this same reform were inaugurated in this country it would mean the substitution, at one blow, of rules of court for the elaborate codes of pleading, practice, and procedure so laboriously built up and con-

strued by the courts in the several States, and we would have to commence all over again.

In considering this proposed important and far-reaching reform, it is not quite safe to rely upon the experience of England under like conditions. Our judicial system differs widely from that of England. It is less stable and, be it said with regret, less to be relied upon. Our judges, in most of the States, are selected by popular vote, and possess the weaknesses of an elective judiciary. Then, too, as a rule, they are elected for short terms, and are dependent upon popular favor for their continuance in office. Change of the personnel of the courts will almost certainly lead to changes in the rules, with added adjudication on the effect of such changes.

Again, it must be confessed that the courts of this country, as now constituted, have not the implicit trust and confidence of the people that courts of justice should command; and for that reason the masses of the people, if they understand what is proposed to be done, would hesitate to deprive their law-makers of this great power and vest it, uncontrolled, in the hands of the judges.

These are some of the weaknesses of the proposal that should not be overlooked or minimized in dealing with this problem. That something should be done to relieve the people of the unfortunate system of practice, pleading, and procedure now afflicting them, few who have given the matter anything like careful consideration will deny. But how this can best and most effectively be done is a question of no little difficulty.

That nothing effective can be expected from legislative bodies, experience and years of waiting have fully demonstrated. Law-making bodies have neither the time nor the capacity to deal, adequately, with the problem. Some other method must be devised, if anything worth while is to be accomplished.

In New York this effort has been made. A Board of Statutory Consolidation was established by the New York legislature, to deal with and make report upon this and other matters affecting the administration of justice and substantive law in that State. This board made to the legislature of 1915 a lengthy and exhaustive report [1] dealing, in part, with this question. It has not been acted upon yet by that body.

In the meantime, in 1915, a Constitutional Convention was held in New York, and this was one of the questions considered and acted upon. Its action on this particular question was rather a weak and certainly an unfortunate compromise. A section was inserted in the new Constitution adopted by the Convention and proposed to the people for their adoption. It is not supposed that this portion of the proposed Constitution had much, if any, influence over subsequent events, but the Constitution, as a whole, was rejected by the people by a large majority, and this proposed reform, feeble and ineffectual as it was, went for naught. Whether the legislature of the State will, under the recommendation of the Board of Statutory Consolidation, deal with the problem more effectively or not is yet to be seen.

[1] Appendix A, p. 129.

For the enlightenment of the people, the proposed Constitution was printed and, after each new section, an abstract of its terms and its effect followed. The section bearing on this question and the abstract of it were as follows:

Section 6. To secure a more simple, speedy and effective administration of justice, it shall be the duty of the legislature to act with all convenient speed upon the report of the board of statutory consolidation transmitted to the legislature by the governor on the twenty-first day of April, one thousand nine hundred and fifteen, and to enact a brief and simple civil practice act and to adopt a separate body of civil practice rules for the regulation of procedure in the court of appeals, supreme court and county courts. The legislature may make the civil practice rules or any part thereof applicable to such other courts as it may provide. Thereafter, from time to time, at intervals of not less than five years, the legislature may appoint a commission to consider and report what changes, if any, there should be in the law and rules governing civil procedure. The legislature shall act on the report of each such commission by a single bill, and the legislature shall not otherwise, or at any other time, enact any law prescribing, regulating or changing the civil procedure in the court of appeals, supreme court or county courts, unless the judges or justices empowered to make and amend civil practice rules shall certify that legislation is necessary.

After the adoption of the civil practice rules by the legislature under the requirements of the first paragraph of this section, the power to alter and amend such rules and to make, alter and amend civil practice rules shall

vest and remain in the courts of the state to be exercised by the judges of the court of appeals and the justices of the appellate divisions of the supreme court, or by such judges or justices of the court of appeals, the supreme court and the county courts as the legislature shall provide.

ABSTRACT.—This section is intended to remedy the existing evils of the civil practice in the courts of the state. It contemplates the adoption by the legislature of a short practice act and a body of practice rules which shall take the place of the practice now regulated by the code of civil procedure. Under the present procedure the practice is regulated by rigid statutory rules which encourage controversies over mere matters of procedure. If the provisions of this section are carried into effect the practice will be regulated by flexible court rules which will tend to remove all disputes over matters of practice. It places the responsibility for the administration of justice upon the courts rather than upon the legislature. The practice act and rules referred to in the section have been prepared by the board of statutory consolidation which has been engaged upon the task for over ten years, its attention, however, during the past two years being chiefly confined to the civil procedure in the courts. This board consolidated the general statutes of the state and prepared the statutory record of the special, private and local statutes of the state as well as that of the general statutes. Its report upon procedure in three volumes which is referred to in this section is now before the legislature and is being examined by a joint committee of the legislature and committee of the various bar associations of the state. This report will come before the legislature for action at its next session.

It will be seen that the duty of enacting a "brief and simple civil practice act" was, in the first instance, imposed on the legislature, and it is authorized once in every five years to "appoint a commission to consider and report what changes, if any, there should be in the law and rules governing civil procedure," and to act on the report. This would seem to authorize the legislature to make changes in the practice and procedure every five years, if recommended by the commission it is authorized to appoint. But, seemingly in conflict with this power, the second paragraph of the section provides:

> after the adoption of the civil practice rules, by the legislature, * * * the power to alter and amend such rules and to make, alter and amend civil practice rules shall vest and remain in the courts of the states.

This looks like giving the courts the right to make and alter the rules at any and all times, and the legislature like power once in every five years. This singular section, if it had been adopted, would have furnished another fine opportunity for litigation over questions of practice, of which we have quite enough already. It may be that it was intended by the section to distinguish between "practice" and "rules of court," in giving power to the legislature and the courts; but the most important function of the court in making rules must be to regulate, control, and change the practice, or the power would amount to very little.

It seems obvious that there cannot safely be any

half-way measures in the settlement of this question. The power to determine the rules of pleading, practice, and procedure must be vested, definitely and exclusively, in one body or another, if we are to avoid confusion and consequent litigation and arrive at anything like a satisfactory solution of this question. Any divided authority, particularly if it be conflicting authority, vested in more than one body, would be most unfortunate. Where that authority should be or remain is the great problem.

Some of the pitfalls in the way of vesting this power in the courts have been pointed out. It suggests the inquiry: Had we better "bear the ills we have than flee to others that we know not of"? The question of the composition of our courts and the manner of selecting judges will be taken up a little later. It may be said in this connection, however, that upon the proper solution of that question must rest very largely the settlement of the question whether or not the power to legislate,—for that is what it means,—upon the important matter of pleading, practice, and procedure shall be transferred from the legislature to the courts.

Again, the fact must be considered that judges are lawyers, temporarily under present laws become judges, again to return to the ranks of the profession. The standing, capacity, and efficiency of lawyers individually, and of the bar as a whole, enter in no small degree into the problem.

That part of the report of the Board of Statutory Consolidation above referred to relating to practice

and procedure is a very interesting and instructive document. It proposes a short and concise "Civil Practice Act" consisting of only 70 short sections.[2] Among other things it provides:

> The procedure in the courts governed by this act shall be according to this act and rules of court to be made and modified from time to time, as herein provided; and in cases where no provision is made, by statute, or by rules, the proceedings shall be regulated by the court or judge before whom the matter is pending.

The power to make such rules is conferred upon "the convention of justices assigned to the appellate division," and that

> until general rules of practice shall be made, as herein provided, the rules hereto annexed shall be the rules of the courts governed by this act, subject to such changes and additions as the courts may make from time to time.

To the act are annexed the proposed rules referred to. They contain very elaborate and specific rules for the conduct of the business of the courts and, together with the proposed practice act to which they are annexed, are intended to, and will to a considerable extent, simplify the practice and reduce the time consumed and expenses involved in litigation.

For a better understanding of the object and purposes of the Board of Statutory Consolidation and what it has endeavored to accomplish, its report on this branch of its work and the practice act it pre-

[2] Appendix B, p. 144.

sents to the legislature for consideration, are set out in the appendix. The proposed rules are too voluminous to be included. The work of this board is worthy of commendation. What it proposes is a long step in the right direction. It tends strongly to remove many of the serious objections to the complicated and elaborate "Codes of Civil Procedure" that have afflicted judges, lawyers, litigants, and the public for so many years,—the State of New York the longest of all.

The matter proposed, however, leaves much yet to to done, to bring about anything like an efficient and inexpensive system of practice, pleading, and procedure. It will be a disappointment to many who have been laboring for reform in this particular. The fact is recognized, however, that this is a great undertaking. Perfection cannot be reached at a bound. What has been done in this instance, whether the work of the board is adopted by the legislature or not, gives hope for still better things. It shows an aroused sentiment in favor of making the courts more effective and less expensive instruments for the speedy and satisfactory administration of justice. It is a very strong and intelligent protest against the present unsatisfactory systems. Among other things, it abolishes the demurrer, a useless pleading as already contended; makes no provision for special findings and conclusions of law, which, as has been said, are worse than unnecessary, and makes some advance towards simplifying the pleadings, but not enough. On the whole it is a work upon which the State of New York, one

of the worst offenders in the matter of code practice, is to be congratulated.

It is much to be regretted that some provision was not made to consolidate or unify the courts into one court as has been done in England. This would afford an example for other States to follow, which might, in time, bring about one uniform court with a like practice throughout the whole country; a consummation much to be hoped and desired.

On the whole, it is believed, notwithstanding what has been said above of the dangers of transferring the power to regulate the practice from the legislative bodies to the courts, that it would be better and more satisfactory to have this done by rules of court. In reaching this conclusion, however, the important fact must not be overlooked that our courts are not as efficient and reliable as they should be. But this only makes it all the more important that the standards of the legal profession should be elevated, and the courts made more efficient and worthy of the trust and confidence of the people.

CHAPTER XV

REPORTS OF DECISIONS

MANIFESTLY something should be done to check the enormous flow and accumulation of reports of decided cases. The effort to trace the dicisions on any subject has become a laborious and, often, profitless task. So many of the cases are practical duplicates of previous decisions, being founded upon them, that the examination of one out of many cases would answer every purpose; yet the careful and prudent lawyer often feels it incumbent upon him to search for and examine them all in the interest and for the protection of his client. When he does, he finds many of the opinions little better than digests of earlier cases. Besides this, many of the opinions are unnecessarily long, thus adding to his unnecessary labors.

If something can be done to shorten opinions rendered, and prevent the publication of thousands of them that are of no consequence as authority on any question of law, it would be a great boon to both judges and lawyers. As it is, law reports have become so numerous and so voluminous that few lawyers in private practice can afford to buy and store them, and these records are severely taxing the space of the public libraries, to say nothing of the expense of

keeping up complete sets of the various State and Federal reports.

This is a matter that has received the attention of the American Bar Association. The report of the Committee on Law Reporting and Digesting of that body, on this subject, is important only as attracting attention to the existing evil and as making some mild suggestions to judges. In all other respects it is exceedingly inconsequential. If this condition, that is growing continually worse all the time, is not dealt with more decisively and effectually than is suggested in this report, it will become an unbearable burden.

It is assumed that it can be dealt with, effectually, only by legislation limiting the delivery of unnecessary opinions and preventing the reporting of many of them that can work no benefit by their publication.

If it were provided that no opinion that is founded solely on previously decided cases shall be reported, the measure would reduce the number very materially.

CHAPTER XVI

EFFICIENCY

WHAT is needed more than anything else, in the way of reforming the practice and putting an end to the useless waste of time and money in the administration of justice, is the increase of efficiency in the performance of their duties by judges, lawyers, and other officers of the courts. This can be done only by making better lawyers and, consequently, better judges.

How to do this is the vexing question. Great stress is laid upon the necessity of requiring higher education and better qualifications in a purely educational way, as a means of gaining admission to the bar. Education is a good thing for one to have, no matter what one's calling may be, but education never made a good lawyer or a capable judge. The profession is swarming with highly educated incompetents. Men go through the great colleges or universities, graduate with high honors, follow this by graduating from the best law schools, pass an excellent examination for admission to the bar, and fail utterly when they come to the profession; while men, many of them men who have been denied these advantages, become great and successful lawyers, and eminent and distinguished

judges. Many of the ablest and most successful lawyers and judges this country has produced never saw the inside of a college or a law school. Lawyers are born, not made by education.

Of course, to be a profound lawyer, one must have an accurate knowledge of the fundamental principles of substantive law, and to be a successful one, he must be familiar with the rules of evidence and of pleading, practice, and procedure, whether he be otherwise well educated or not. One must have the natural qualifications, the bent of mind necessary for his calling to be successful. If he has these qualifications, a good education will help him, increase his efficiency, and make the rough road he must travel as a practitioner easier and less rugged; but if he has them not, to educate him for the profession is "casting pearls before swine." He may make money and subsist upon his work as a lawyer, but he will never make a great nor even a good lawyer, and his clients, the profession, and the public interests will suffer as the inevitable result of his inefficiency and incompetence. He may be a man of good sense and high character; but these will not suffice even for the highly educated. In some lines of endeavor he would succeed, and his education aid him to reach success; but his entry into the legal profession will prove to be a grave mistake, and his life a disappointment and a failure.

If we add to this class of incompetent members of the profession the large number who possess neither natural qualifications and adaptability nor education, the number of men in the practice who lower the

standard of the profession as a whole, and who should not be there, assumes large proportions. If they were excluded, it would probably reduce the number of lawyers fifty per cent, or even more.

There is still another class of incompetents to be added, namely: the men without education or natural qualifications, without principle, and without honor. The mere incompetents may be, and often are, men of honor, who respect the profession, uphold its ethics, and stand for the highest standards; but the latter class are in the profession for the money they can get out of it, and use the law solely for that purpose, without regard to principle, professional honor, or integrity. They are leeches on unsuspecting clients and the public.

The people who employ lawyers cannot judge of their qualifications and know nothing of their standing in the profession. The poorest and least trustworthy and reliable of the profession often make the greatest show and the most noise, and thereby secure business from the ignorant and unsuspecting. It is such as these that crowd the court calendars with cases without merit, that never should be brought, add unnecessarily to the labors of the courts, and increase materially the expense of administering justice, solely to make the fees that can be garnered from this spurious litigation. Such lawyers are a great trial to upright and competent judges and bring great discredit upon a profession that should be worthy of the highest trust and confidence. But they carry with them the indorsement of their State, through its highest courts,

as to their qualification and fitness to practice their profession, in the form of a certificate of admission to the bar. So unjust did this seem that one of the ablest and most upright jurists of the State of California, who was Chief Justice of the Supreme Court of that State for many years and until his death, maintained that no certificate of admission should ever be granted but that the lawyer, like men of other professions and callings, should stand upon his own merits, without the indorsement by the court of his qualifications and moral standing, an indorsement that was often misleading. This extreme position was not without reason and justice to support it.

One of the States for many years, if it does not now, require nothing of an applicant for admission to the bar but that he should be a citizen and a man of good moral character, and the bar of that State will compare favorably, in standing and ability and all that makes for a good and efficient lawyer, with that of any other State in the Union.

So it will not do to rely upon mere educational qualifications, or the certificate of admission, in any effort to raise the standard or increase the efficiency of our great body of lawyers—good, bad, and indifferent. In all the States the profession is overcrowded, largely with the incompetent, and, in too great a proportion, with the dishonest and vicious.

Another element, much to be regretted, that has tended to reduce the standards of the profession, and lessen the confidence of the people in its integrity, is commercialism. Great corporations have come in

large degree to own and control many of the ablest lawyers in the country. The attorney who accepts such an employment is placed largely on the same level with other employees of the corporation and in great degree submerges himself in its business, loses his independence, and becomes a sort of machine, subject in his conduct to the will of a body of men whose one controlling aim is making money. Commercialism, the greed for money, has become the bane of this country and the legal profession has not escaped its blighting influences.

Elihu Root, one of the great lawyers of the country, in an address [1] before the American Bar Association, as its president, at its annual session of 1916, under the title "Public Service by the Bar," had this to say on the subject of lawyers in this country:

There is great economic waste in the administration of the law viewed from the standpint of the nation and of the states. There is unnecessary expenditure of wealth and of effective working power, in the performance of this particular function of organized society. We spend vast sums in building and maintaining court houses and public offices and in paying judges, clerks, criers, marshals, sheriffs, messengers, jurors, and all the great army of men whose service is necessary for the machinery of justice, and the product is disproportionate to the plant and the working force. There is no country in the world in which the doing of justice is burdened by such heavy overhead charges or in which so great a force is maintained for a given amount of litigation. The

[1] Appendix E, p. 169.

delays of litigation, the badly adjusted machinery, and the technicalities of procedure cause enormous waste of time on the part of witnesses and jury panels and parties. The ease with which admission to the Bar is secured in many jurisdictions and the attraction of a career which affords a living without manual labor has crowded the Bar with more lawyers than are necessary to do the business. Of the 114,000 lawyers in the United States according to the census of 1910, a very considerable part are not needed for the due administration of justice. If that business were conducted like the business of any great industrial or transportation company which is striving for the highest efficiency at the least cost in order to compete successfully with its rivals, a very considerable percentage of the 114,000 would be discharged. We at the Bar are not producers. We perform indeed a necessary service for the community, and to the extent of that necessary service we contribute towards the production of all wealth and the effectiveness of all energy in the community, and we take toll, rightly, from all the property and business in the community for the service. Superfluous lawyers, however, beyond the number necessary to do the law business of the country, are mere pensioners and drags upon the community and upon all sound economic principles ought to be set to do some other useful work. There is plenty of work for them to do on the farms of the country.

A more extended quotation from this admirable address will be found in the appendix.

As has been indicated, the address attaches altogether too much importance to the matter of education as a means of raising the standard of the pro-

fession. Too strict requirements of this kind will exclude from the profession the best materials and admit to its ranks many highly educated men, mere machines, destitute of the very qualifications that make the great and reliable lawyer. We have altogether too many of that kind of lawyers in the profession now.

Out of the mass of lawyers, competent and incompetent, reliable and unreliable, honest and dishonest, our judges are selected. If they have been incompetent or unreliable lawyers, they will be incompetent and unreliable still as judges. They are selected by the masses of the people by popular election. The people are no better qualified to judge of the fitness of a man for judge than they are to select a good and reliable lawyer from the mass of the profession. They are often misled and fooled into supporting a candidate, just as they were deceived into employing him as a lawyer, by his pretensions, his noisy assertion of his qualifications, and his personal popularity as a man.

Under such influences many incompetent and some unreliable lawyers are called to the bench and add immensely to the maladministration of the laws, the unnecessary delays that ensue, and the unnecessary expense of maintaining the courts.

Of late years, more than ever before, politics has entered into the problem in a most offensive and disastrous way, and its malign influences have been increasing to an alarming degree. Time was, and that within the lives of present members of the bar, when it was looked upon as unseemly, even disgraceful, for any one to seek a judicial office or to resort to any

kind of exploitation of himself or his claimed qualifications for such an office. Now it has become so common for lawyers to enter the lists as candidates for judicial offices and advertise themselves by flaring billboard advertisements and other little less objectionable and offensive ways, and by a personal canvass and speech-making; that this offensive method of securing judicial places is but little noticed. Such an unseemly exhibition of greed for office is a severe shock to the sensibilities of the old-time lawyer, who still retains some sense of the proprieties in this respect.

In a contest of this kind merit, or qualification and fitness for the office, counts for but little. The best advertiser of himself with the most money with which to exercise his qualification for self-exaltation, has far the better chance of election, no matter how little he may be qualified for such a trust. Efficiency enters very little, indeed, into such a contest for office. The evil of this condition does not end with the election. The judge is elected for a short term of years. He yearns for a second term. To make sure of this much-desired continuance in office, he must make himself popular with the people, especially the men who control politics and votes. The man who has secured his election by the methods above mentioned will be more than likely to use his office, when he gets it, to further his efforts to hold it for another term.

Not all judges, of course, will yield to this temptation. Neither will all lawyers who aspire to be judges resort to political methods to secure the office. But

one who can so far forget the ethics and the proprieties as to secure his election in that way is far less likely to stand firm, as a judge, against the temptations of self-interest than he who stood firm in the beginning. Unfortunately, with such men their political aspirations and practices do not end with their election, nor are they always confined to questionable efforts to secure their reëlection. Altogether too often they become ambitious to hold other offices, of a political nature, and, while on the bench, become candidates for other offices. This practice by judges of the courts of becoming such candidates is demoralizing to the judicial tribunals, and in a great measure destroys or reduces their efficiency.

This phase of the question was brought sharply to the attention of the American people by the late nomination of a Justice of the Supreme Court of the United States for the office of President of the United States. It must be said for the candidate that he in no way used his position as a justice of the Supreme Court to secure his nomination for this high office, nor did he become a candidate or allow any one to represent him or seek for him the nomination. The great honor of such a nomination came to him unsolicited and uninfluenced by any action of his own, or that of any one authorized to represent or speak for him. Unfortunately, however, when the nomination was tendered him he accepted it, resigned his office of judge, and entered upon an active personal campaign for his election. He was defeated at the election that ensued.

At the same election two out of three of the judges of the highest court in one of the States became candidates for United States Senator and actively campaigned for their election, while still holding their judicial offices. There were other cases of like kind. Some of the States have legislated to prevent this sort of thing, by providing that one elected to a judicial office shall not be a candidate for any other office during the term for which he was elected, or words to that effect; which not only prevents him from becoming a candidate for another office while occupying his place on the bench but prevents him from resigning to become such candidate. This is a very wholesome piece of legislation, but, unfortunately, it is held not to prevent a judge from becoming a candidate for a Federal office. This is a matter that should receive the early attention of Congress and meet with prompt and effective treatment.

In view of this condition of things it may be well to give some attention here to what has been said by some of the jurists and statesmen of the country on this grave subject affecting so seriously the standing and efficiency of the courts. Involved in it is the further question of how and in what manner judges should be selected, and for how long a term: whether for a term of years of short duration, or for life, or during good behavior.

In his capacity as United States Senator, the author had occasion to consider one phase of the subject, namely: that of a judge becoming a candidate for a

political office, and in the course of an address on that question in the Senate, had this to say:

Partisan politics is ruthless in its demands and invades the most sacred precincts of the National Government. It is seeking place and pelf and power wherever and whenever it can find entrance. Just now it is attempting to invade the Supreme Court of the United States. It is presenting to a member of that body the greatest temptation that could be offered to an American citizen —to surrender his place on the bench and become a candidate for a political office. This attempt to bring the highest judicial tribunal of the country, or any member of it, into politics should be resented not only by the member to whom the tempting offer is made but by the whole country. To my mind it is of the gravest importance that that great tribunal should be separated absolutely and forever from politics, candidacy for office, or any interest in elections beyond that of the disinterested and patriotic private citizen. If any member of the Supreme Court is tempted by an offer of a nomination as a candidate for the Presidency of the United States and refuses the offer because he is a justice of the Supreme Court and for that reason can not conscientiously accept a nomination to a political office or engage in politics, he will have rendered his country a great and lasting service. If he does that one act of unselfish patriotism and devotion to the best interests of his country, that has so signally honored him, it will keep his memory green in the minds of his countrymen long after the politicians who thus tempted him are forgotten. The use of his name as a candidate is an offense to him and to the country.

And again, on another occasion:

I have had occasion heretofore to express my views on the subject of the election of judges to political offices. In a speech delivered by me in this body April 12, 1916, in speaking of the Supreme Court of the United States, I said, in part:

"To my mind it is of the gravest importance that that great tribunal should be separated absolutely and forever from politics, candidacy for office, or any interest in elections beyond that of the disinterested and patriotic private citizen."

But my objections to judicial officers becoming candidates for any other office are not confined to that great court. They apply with equal force to all judges, State and National. In some of the States, be it said to their credit, a judge is forbidden by law to be a candidate for any other office during the term for which he was elected. Unfortunately, it is held that this inhibition does not apply where the judge is a candidate for a Federal office; for example, United States Senator. There may be cases of extreme exigency where the salutary rule that I am contending for might with justice and propriety be violated in the public interest, but such cases must be exceedingly rare. Members of the Supreme Court have spoken at different times, urging in no uncertain terms the impropriety of themselves being candidates for President of the United States. Thus Chief Justice Waite, when asked to be a candidate for President, had this to say:

"Of course, I am always grateful to my friends for any effort in my behalf, and no one ever had those more faithful or indulgent. But do you think it quite right for one occupying the first judicial position in the land

to permit the use of his name for a political position? The office came to me covered with honor, and when I accepted it my chief duty was not to make it a stepping-stone to something else but to preserve its purity, and, if possible, make my name as honorable as that of my predecessors. No man ought to accept this place unless he shall take a vow to leave it as honorable as he found it. There ought never to be any necessity for rebuilding from below. All additions should be above. In my judgment the Constitution might wisely have prohibited the election of a Chief Justice to the Presidency. Entertaining such a view, could I properly or consistently permit my name to be used for the promotion of a political combination as now suggested? If I should do so, could I at all times and in all cases remain an unbiased judge in the estimation of the people?"

Under like circumstances, Mr. Justice Hughes expressed similar lofty sentiments, as follows:

"The Supreme Court must not be dragged into politics. A judge of the Supreme Court should not be available, though he is nominally eligible, for elective offices. The moment he assumes the judicial office he ceases to be a partisan and knows, or should know, no partisan obligation. The moment he accepts a party nomination one or more things happen and happen explicitly.

"First, a political party may undertake to capitalize the judicial decisions of its candidate than which nothing could be more deeply violative of the spirit of the judicial institution. His decisions would, moreover, become subject to the partisan and passionate review of partisan strife. Worst of all, it is not inconceivable that, if men are to step down from the bench to elective office, de-

cisions may ultimately be rendered with a view to the contingency of such public and necessarily partisan review.

"Such a situation would be certain to lessen the independence of the judiciary, as it would inevitably impair the Nation's confidence in the unswerving integrity of the court. Of what real and permanent value were the decisions of a judge to-day who on the morrow may choose or be chosen to sue for the favor and suffrage of the electorate?

"More important than the outcome of the present political contest, however large it looms at present, is the perpetuating of the organic institutions or sovereignty of the Republic. One such institution coördinate with the executive and legislative is the judicial. The people rightly believe in the integrity and the incorruptibility of the Supreme Bench. The justices of the Supreme Court of the United States are privileged by virtue of their office to render service of the highest order to the Nation.

"The performance of that service and the maintenance of the dignity of that office depends in largest part upon the will of the members of that court to suffer no personal ambition for elective office, however great their gifts, and though their fitness be in every other respect beyond question, to influence their judgment or to affect the attitude of the Nation to the Supreme Court as a tribunal, which, without personal aims and above private ambition, seeks to interpret the law upon the basis of the Constitution of the United States. * * *

"I hope that as a justice of the Supreme Court I am rendering public service and may continue to do so for some years; but the Supreme Court must not be dragged into politics, and no man is as essential to the country's

well-being as is the maintained integrity of the courts."

And Mr. Justice Miller, another distinguished member of the court, refused, in 1876, to be a candidate for the Presidency for the same reasons.

Notwithstanding the strong sentiments of the judges themselves against their being candidates for political offices, it is not an uncommon thing to see judges running for other offices not only during the terms for which they were elected but during the term of their actual and active service on the bench and without even resigning their judicial positions.

MR. PRESIDENT, to me this is an unpardonable offense. It should be expressly forbidden by law in the Government as it is in a number of the States, and this not alone because of the impropriety of dragging the courts into politics but for the better and stronger reason that it tends to break down the constitutional barriers between the different departments of government and thus destroy one of the greatest safeguards to the liberties of the people and the maintenance of our republican form of government.

The venerable John T. Morgan of Alabama, when a United States Senator from that State, said:

The Constitution should provide and public opinion should earnestly support the provision that a judge appointed for life should be consecrated for life to the service of the country only in a judicial calling.

And William H. Taft, former President of the United States, in a speech delivered before the American Bar Association, at its annual meeting September

1st, 1913, at Montreal, Canada, in speaking of the life tenure of the Federal judges, used this expressive language:

Other benefits from the life tenure in its effect upon the judges who enjoy it are that it makes the incumbents give their whole mind to their work, to order their household with a view to always being judges, and to take vows, so to speak, as to their future conduct. They must put aside all political ambitions. One of the great debts which the American people owe to Mr. Justice Hughes is the example that he set in the last presidential election, when the most serious consideration was being given to making him the candidate of the Republican Party. He announced his irrevocable determination not to enter the political field because he had assumed the judicial ermine.

It was asserted that John McLean, a justice of the Supreme Court, had been an aspirant for the Presidency while holding that office. One of his surviving relatives, evidently looking upon it as an aspersion on his character and standing as a justice of that exalted tribunal, wrote of it as follows:

My attention has been called to recent communications of the press in reference to the custom of Justices of the United States Supreme Court seeking the nomination for the Presidency.

It has been stated that Justice McLean was the most pronounced in his activity of any Justice of that court relative to presidential aspirations.

This statement is positively incorrect. Justice McLean's

name was very prominent for some years for the nomination by the Republican Party.

Like Justice Hughes of the Supreme Court, he always declined to be interviewed on the subject, but, unlike Justice Hughes, had decided in his own mind he would never accept a nomination for the Presidency.

In the famous Dred Scott decision Justice McLean and Justice Curtis dissented from the opinion of the court.

This was just previous to the Republican convention. Justice McLean asked the Chief Justice as a favor to him not to announce the decision of the court until after the Republican convention. The Chief Justice granted his request.

Justice McLean feared if his dissent from the opinion was known, it might stampede the convention in his name, and subject him to the embarrassment of declining the nomination, which he certainly would have done.

There was much favorable comment at this time of this man's noble character. It seems strange he should now be so misrepresented. Alas! how soon we do forget!

This question has been agitated for many years. *Harper's Weekly,* in August, 1874, had this to say on the subject:

The absolute independence of the judiciary is indispensable, and patriotism and good sense alike warn us to avoid any practice which tends to compromise it. Yet if the bench is to be considered as a stepping-stone to purely political offices, if, indeed, it is not to be regarded as a bar to such positions, its independence is necessarily imperiled. * * * The disposition to disregard this peril

and to consider judges as not practically debarred from the seductions of caucuses and conventions ought to be imperatively checked.* * * Party managers and judges should be taught that political candidates are not to be taken from the bench, for judicial deliberations must be guarded, as far as possible, from that most insidious of influences in a free government—party spirit.

And the *Central Law Journal,* of September 3, 1874, used this decisive language:

It is not improbable that the popular confidence in the integrity of the highest court of the Nation may have been, to some extent, impaired within the last few years by the knowledge that some of its members were possible, or even probable, candidates for the Presidency.

Whenever the integrity of the bench is subject, in any considerable degree, to the misgivings of intelligent hope, it is a public misfortune. The repose of society requires that the popular judgment should rest with confidence in the impartiality of the bench, and this can not be if the bench comes to be looked upon as a stepping-stone to political preferment. Judges, however, are but men, and as long as the people will bring them forward as candidates for high political offices there are very few that will have the self-denial to resist the temptation.

Senator Walsh of Montana, in a speech on this subject, delivered in the United States Senate, July 31, 1916, closed by saying:

No more deadly blow at the federal judicial system has ever been directed against it than the nomination of

Justice Hughes by the Republican convention. Polemics innumerable have been written in denunciation of that system without any appreciable effect on the public mind. Let one of the justices of the Supreme Court, however, resign to wage a successful campaign for the Presidency, and it will never again determine a case like Lawlor against Lowe, for instance, without calling out speculation as to how far the result was due to ambition, "the last infirmity of noble minds," on the part of some dominant member of the court. It can not maintain the high place it has achieved before the world under criticism of such a character. It cannot hold the confidence of the people which it now, happily, enjoys in such generous measure under conditions that afford room even for detraction upon such ground. The very basis upon which the life tenure and the appointive system in the case of Federal judges rests would be undermined, and a constitutional amendment such as the resolution of the Senator from Colorado contemplates alone could, if anything could, arrest the rising demand that would certainly ensue for a radical change in those provisions of the Constitution through which the fathers believed they had secured the independence of the national judiciary.

The speech was made in support of the following proposed amendment to the Constitution, offered by Senator Thomas of Colorado:

No judge of the Supreme Court or any inferior court, now or hereafter ordained, or established, shall, during his continuance in office, or for a period of two years after such continuance, be qualified or eligible to any elective office under the Constitution and laws of the United States.

It is devoutly to be hoped that such an amendment to the Constitution will be adopted at an early day.

Other equally strong protests against a judge's becoming a candidate for another office might be cited in great numbers, but those cited will suffice for the purpose in hand.

The comments relating to judges in politics naturally bring us to a consideration of the respective merits of the elective and appointive systems of selecting judges. Each of them has its merits and its demerits. The elective system appeals strongly to public sentiment, because it is more democratic and makes the judge more subservient to the will of the people. But this element of subserviency is its greatest weakness. In the report of Charles W. Eliot and others to the National Economic League, to which reference has already been made in discussing the comparative efficiency of appointive and elective judges, it was said:

> The unfortunate situation in which the judge sits as a mere umpire in a game between counsel grew up under an elective bench and is to be found chiefly, if not wholly, where the judiciary is elected for short terms. This is true also to a large extent of the well-known abuse which often requires at least as long a time for the selection of a jury as for the trial of a cause. This condition for instance is quite unknown in the federal courts or under the appointed judiciary in Massachusetts and New Jersey. Lack of control over the bar on the part of judges, who cannot insist upon expedition without imperiling their positions, is not the least cause of unnecessary continuances and postponements and of the

wranglings of counsel and the unfortunate treatment of witnesses which have cast discredit upon American trials.

Above all things, a judge should be independent and fearless in the administration of justice. The public will, altogether too often, becomes unreasoning public clamor, excited by prejudice or other evil influence and, if followed, leads to injustice that even the public in cooler moments, when reason is again enthroned, regret and condemn. There are times when fearless and independent judges become the defenders of right, justice, and liberty against a prejudiced misguided, or evil public sentiment. Happily, we have such judges under the elective system now prevailing; but often wrong public sentiment tests the integrity, manhood, and patriotism of the judge to the breaking point and the weak and subservient give way. This is particularly true in times of war, where passions run high, hatred is rampant, and intolerance of others' opinions is sweeping over the country. It is then, more than at any other time, that an independent judiciary is needed to protect the liberties of the people and prevent wrong and oppression.

At this time we are witnessing scenes of wrong and oppression and a degree of intolerance shocking to the sense of right-thinking citizens of a free and independent Republic, with a Constitution guaranteeing freedom of speech, freedom of the press, and the right of peaceable assembly. Never in the history of this Republic was a courageous, liberty-loving, patriotic judiciary more vitally necessary than now. Brought

to this supreme test, what judge would be the most likely to stand firm and do his whole duty guided by the Constitution he has sworn to support: the one elected by the people for a term of years, hoping to be reëlected; or one appointed for life, or during good behavior? The one is dependent upon public favor for his continuance in office, the other is secure in his place and wholly independent of public favor or disfavor. One is sorely tempted to do what public sentiment or public clamor, right or wrong, demands, so that he may continue in favor as a means of securing a further term of office. The other may like to preserve for himself the good will of his fellow-men, but that is the only inducement he can have for doing their bidding. So far as his continuance in office is concerned, he need not court their favor. He may, with perfect safety, do what he conceived to be his duty, and suffer nothing but a temporary loss of public favor; for if he does his duty, however unpopular his course may be at the time, it will be temporary only and he must eventually be rewarded by increased respect and confidence.

What has been said is not confined to war times. In times of peace public sentiment and the public will are perverted by prejudice and self-interest, and a righteous judge will be on constant guard against such influences.

Now, of the appointed judiciary. What are its elements of strength and weakness as compared with the elective judiciary? For one thing, a judge whose term is fixed for life, or even one who holds for a

shorter time but is not beholden to the people for his reëlection, is likely to be altogether too independent. He is in a position to defy public sentiment, and is more likely to be led astray by powerful private interests. Indeed, it is claimed, and not always without reason, that Federal judges are too favorably disposed to the great corporations than is consistent with the righteous performance of their duties and the administration of justice between man and man, and that they are too often arbitrary, and sometimes offensive, in their independence. That this is not true of most of the Federal judges, lawyers who practice before them very well know. It is true, nevertheless, to some extent, with some judges. Another not wholly unfounded claim is that Federal judges are sometimes too favorably disposed toward the Government, where conflicts arise between the Government and private interests.

Independently of the course or conduct of any individual judge, there is undoubtedly good reason for the feeling that, in such litigation, the Government has the advantage. The manner in which such judges are selected may well excite this apprehension in the mind of a citizen engaged in litigation with the Government. Practically, Federal judges are selected by the Attorney General of the United States. All applications for appointment are referred to, investigated by, and reported upon by him, and, where there are a number of applicants, he recommends to the President the one selected by him, and usually his recommendation is approved and the applicant of his choice

appointed. The Attorney General is also the attorney of the Government in all its litigation before the judges he has selected. Not only this, but he assumes, and actually exercises, the right to investigate and supervise the course and conduct of these same judges, and has, in some instances,—whether generally or not is not known,—made secret investigations of Federal judges through secret agents and without the knowledge of such judges. Again, all United States district attorneys who appear before the Federal courts in behalf of the Government are appointed in the same way, and are subject to the same investigations and influences.

This manner of appointing judges and holding over them the threat of investigation of their conduct by the attorney who must represent the Government in all its litigation before them, is utterly inconsistent with the independence and freedom from restraint that should characterize the judicial office.

Upright judges should resent, and in some cases have resented, the claim of the Department of Justice to exercise this power of espionage over them and their courts, but without avail. A strong and self-reliant judge will disregard any such exercise of power and be uninfluenced by it, but the weak or subservient judge will not. The power of selecting judges and investigating, controlling, or exercising any influence over them, or their officers, by the Attorney General should be taken away entirely, by law if necessary. No court should be controlled directly or indirectly by any attorney, no matter what his official

character may be, who, in the performance of his duties as such attorney, must represent any litigant before it. The power of selecting or even recommending judges for appointment and the investigation of their work, or conduct, if that be necessary, should be vested elsewhere.

It has been very generally conceded, at least until very lately, that more capable and efficient judges have been obtained by the appointive system of the National Government than by the elective system that prevails in the several States. But it cannot be said that business is done in the Federal courts more expeditiously, or with less expense, than in the State courts. As a rule, the reverse of this is true. Litigation in the Federal courts is longer delayed and more expensive than is the rule in the State courts.

So, if we consider only the question of time and money involved in litigation, and compare the two systems of an appointive and an elective judiciary as they now exist, nothing would be gained by adopting the appointive system in the States. What would be gained, if anything, would be greater independence and greater efficiency in respect of the adjudication of cases, irrespective of the question of the time and money expended in reaching results. In this respect there can be no doubt that better results would be attained by an appointive judiciary.

But there is another phase of this important subject that should not be overlooked. Ours is a representative Democracy,—at least, theoretically. It is a government of the people. Up to our entry into the Euro-

pean war the tendency undoubtedly was to vest in the people greater controlling power over the affairs of government than they had exercised hitherto. The war for the time being, at least, has put an end to this democratic movement, and, as a necessary and inevitable result of the war, we have become for the time an autocracy,—a one man power.

To take away from the people the right to select their judges by direct vote, and vest the power of appointment in some officer elected by them, is unquestionably a step in the opposite direction. In this respect the conditions of the National Government are quite different from those of State governments. There are greater reasons why Federal judges should be appointed, because their election by a countrywide vote, whenever a vacancy should occur, while possible, would be impracticable. This is not so in the States, where frequent elections are held; and there is no reason why judges should not be elected with other State officers.

It may be that the claim that the selection of judges by popular vote and for short terms is safer and more democratic is more sentimental than practical; but it is believed that it is a sentiment that appeals to the people generally and one that cannot, with safety, be disregarded. Still the inquiry remains: Would we, by making the judicial office appointive, escape the corroding, degrading political influences that have gone so far to lower the standard of our courts and deprive them of the support of public trust and confidence that every court should have? It is

much to be regretted that experience has proved beyond controversy that no such result would follow the change. In the States the appointing power would, almost certainly, be vested in the governors. Generally speaking, governors are politicians, and their appointments, even to judicial offices, are political. Not only so, but in most cases these appointments, like others, would go to those who had rendered personal political services to the governor. This has, with very rare exceptions, been the case in the appointment of Federal judges. It has, with two or three commendable exceptions, been conspicuously so of later years.

So, it must be seen from what has been here suggested, and for other reasons that might be advanced, that this is a problem of no little difficulty. There can be no doubt that there is serious and well-founded dissatisfaction with the courts as now constituted and with their manner of doing business. This feeling of discontent with things as they are is deep and widespread. But will the cause of dissatisfaction be removed, or even mitigated, by changing the manner of selecting the judges, as suggested? It is believed that such a change would have very little effect in respect of the causes of this discontent and dissatisfaction with the courts now so generally prevalent in the minds of the people.

On the whole, there is little cause to complain of our judges, except in the matter of unnecessary delay and expense of litigation which they could in very large degree prevent. As a body, and with rare ex-

ceptions, they are men of high character, intelligent, and anxious to perform their duties with fidelity and in the public interests. They are human and have their weaknesses, like the rest of us; but, with very few exceptions, their integrity and honesty of purpose is beyond question. It is very doubtful if their standard of honesty, intelligence, or efficiency would be increased in the slightest degree by making the office appointive, so long as appointments are made on the present basis of politics, and political services rendered to the appointive power.

Taking a purely personal view of it, the author would prefer to see the power of appointment vested in some non-partisan, non-political body, and the judicial places filled on merit and wholly without regard to political considerations; and, this being done, to see judges appointed during good behavior rather than subject to the uncertainties of election by popular vote. But unless appointments could be based on such considerations, and entirely removed from politics, we had in this particular just as well leave our courts as they are, and endeavor to make our present judiciary more efficient and expeditious in the performance of its duties.

The system proposed by the report of the committee of nine to the Phi Delta Club of New York, provides for the election of the Chief Justice by popular vote and the appointment of the other judges by him, which is probably the nearest approach to a non-partisan, non-political judiciary that has yet been devised or suggested.

APPENDIX A

REPORT OF STATUTORY CONSOLIDATION ON SIMPLIFICATION OF CIVIL PRACTICE MADE TO THE LEGISLATURE OF NEW YORK, APRIL 1, 1915

To the Legislature:

We have the honor to submit herewith the report of the Board of Statutory Consolidation on the simplification of the civil practice in the courts of the state pursuant to chapter 713 of the laws of 1913.

In presenting this report it seems appropriate to state briefly the lines along which the work of the board has proceeded.

History of Prior Revisions

When the state constitution was adopted, the people of the state accepted as a part of the law of the new commonwealth the common law procedure of England as the same had been modified by the legislature of the colony of New York, subject to such alterations and additions as the legislature of the new state might from time to time enact with reference thereto. (Constitution 1777, Art. 35.)

The dissatisfaction with the condition of the procedure in the courts as well as with the general substantive law was voiced in the provision of the constitution of 1846 which directed the legislature to appoint commissioners to reduce into a written and systematic code so much of

the whole body of the law of the state as seemed practicable and expedient to them. (Constitution 1846, Art. 1, § 17.)

Pursuant to this provision of the constitution, the Code of Procedure was adopted in 1848 which made substantial changes in the common law practice and regulated the bulk of the procedure by statutory rules.

The Field code, by which name the Code of Procedure of 1848 was commonly called, sought to regulate only the general features of the practice by statute leaving the courts to control the details by means of rules.

This system together with other statutes bearing upon the subject continued to govern the procedure in the courts until the adoption of the first part of the Code of Civil Procedure in 1877 which with the supplemental chapters added in 1880 has regulated the practice in this state down to the present time.

The Throop code, by which name the Code of Civil Procedure has been known, was based upon the idea of bringing together within the covers of a single book all matters relating to procedure whether substantive or otherwise and regulating all of the details of practice by statutory enactments.

The criticisms that were made against the Code of Civil Procedure at the time of its adoption have been fully justified by experience; and ever since its enactment, speeches, addresses and reports have been hurled against it.

The agitation on the subject resulted in the passage of an act in 1895 providing for the appointment of commissioners to report "in what respects the civil procedure in the courts of this state can be revised, condensed and simplified." (L. 1895, ch. 1036.)

The final report in pursuance of this statute was submitted to the legislature five years later but opposition arose to the plan followed by the commissioners and the report failed of adoption.

In 1899 a report of the Committee on Law Reform of the State Bar Association was made, in which the committee recommended "a simple practice act containing the more important provisions of the present code rearranged and revised, supplemented by rules of court."

A joint committee of the legislature in 1900 recommended a general plan, one of the features of which was "to reduce the general practice provisions to a single brief legislative practice act."

In 1903 a committee called the Committee of Fifteen made a report to the legislature pursuant to chapter 594 of the laws of 1902 in which it made various recommendations which would give as the report states: "A statute covering practice only, supplemented by such rules as may be deemed necessary to carry out fully its provisions."

In 1903 the Committee on the Law's Delay made its report with reference to the condition of procedure in the first department and made certain recommendations which however were not adopted. (L. 1902, ch. 485, amended by L. 1903, ch. 634.)

Board of Statutory Consolidation

At the time the Board of Statutory Consolidation was created by chapter 664 of the laws of 1904 by which it was authorized not only to consolidate the general statutes of the state but to revise the practice in the courts.

The board found the task of simplifying the practice

too great a one in conjunction with the work of consolidating the statutes and therefore directed its attention to the latter.

In 1909 the board presented a consolidation of the general substantive statutes of the state which were adopted that year and later it prepared a statutory record of these statutes and also a statutory record of the special, private and local statutes.

The simplification of the practice however had not been overlooked by the board and in 1906 there was prepared a reclassification of the provisions of the Code of Civil Procedure under a logical analysis following the steps in the progress of an action.

In 1912 by chapter 393 the legislature directed the board to examine and report a plan for the classification, consolidation and simplification of the civil practice in the courts of this state and in the following year this report was presented to the legislature.

In 1913 the board was directed to prepare and present to the legislature "a practice act, rules of court and short forms" as recommended by the board in its report to the legislature of 1913. (L. 1913, ch. 713.)

In accordance with that statute we report to the legislature of 1915 statutes and rules designed to carry out the directions of the legislature and to simplify the practice in the courts of the state.

Fundamental Ideas of the New Practice

It would be useless to attempt to call attention to all the changes that the board has made in carrying out the directions of the legislature to simplify the civil practice but the main ideas that have governed the board in its work may be summarized as follows:

(1) The preparation of a short practice act to be adopted by the legislature which would direct the changes necessary to simplify procedure and adapt it to present conditions.

(2) The preparation of rules of court by the courts which would regulate the important matters of practice and which would be under the control of the courts.

(3) The preparation of such changes in the practice as would simplify and modernize it so as to secure a prompt determination of legal controversies according to the substantive rights of the parties.

Short Practice Act

In order to carry out these fundamental ideas the board has prepared a short practice act of 71 sections, but in order to take care of provisions in the Code of Civil Procedure not strictly matters of practice, it was necessary for the board to prepare:

(1) An Evidence Law and a Costs, Fees, Disbursements and Interest Law to which and to existing Consolidated Laws, matter of a substantive character now in the Code of Civil Procedure has been distributed:

(2) A Surrogate Court Act and a Justice Court Act, as separate statutes which the board has done without intentional change and to place the court of claims practice and the practice in local city courts in appropriate statutes.

Rules of Court

The board has prepared 401 rules of court to accompany the short practice act.

In the preparation of these rules the board has endeavored (1) to make the rules as general as possible and

to cover as many cases as practicable and (2) has omitted the unimportant minute details of practice which so encumber the Code of Civil Procedure.

Flexibility of the Rules

These rules being subject to modification by the courts and not hard and fast statutory enactments will discourage litigation over procedural matters and place the responsibility for the efficiency of judicial administration upon the courts where it belongs rather than upon the legislature.

Features of the New Practice

In recommending changes in the practice the board has been governed by the idea of simplifying and modernizing the practice so as to make it more speedy, less expensive and more certain than it is at the present time.

The main feature of the new practice may be summarized as follows:

(1) A complete change in the method of regulating the civil practice from inflexible statutory rules to flexible court rules to be adopted by the courts has been made;

(2) A uniform method for conducting actions in place of the existing disjointed method of regulating many actions by special provisions has been adopted, thus avoiding duplication of provisions;

(3) Special proceedings in the code have been abolished and all proceedings under the new practice are required to be brought in the same way by a summons and complaint and to be subject to the same rules of procedure as an action;

(4) One form of action under the new practice has

been provided and the proceedings for relief whether heretofore denominated legal or equitable or whether brought by summons or by notice are required to be commenced in the same way and to be conducted in the same manner under general rules provided therefor;

(5) All writs in the code have been abolished except the writ of habeas corpus and a uniform procedure by action has been substituted in their stead;

(6) Provisions have been made for one trial of the facts so far as practicable and a case may be submitted to a jury by reserving questions of law or submitting the facts in such a way as to obviate so far as practicable a second trial of the same facts;

(7) One course of appeal has been provided so far as practicable and the courts have been authorized to disregard on appeal mistakes, irregularities and defects not affecting substantial rights; to take proof of such matters as they can constitutionally to avoid new trials and to encourage a retrial only of questions with respect to which an error was committed;

(8) The widest latitude practicable has been afforded to the court in disposing of sham defenses and granting summary judgment in cases where such relief is necessary in order to do justice;

(9) Any cause of action or counterclaim may be set up subject to a direction by the court for a separate trial of any issue where it may be deemed expedient or necessary.

(10) All parties, plaintiff and defendant, claiming an interest in the subject of the action, whether jointly, severally or in the alternative, may be joined subject to an order for a separate trial where the court shall deem a separate trial expedient or necessary;

(11) Provision has been made so that no action shall be defeated by a non-joinder or misjoinder of parties and new parties may be added and parties misjoined may be dropped by order of the court at any stage of the case as the ends of justice may require;

(12) The parties have been required by more specific denials, admissions and statements in their pleadings to point out the actual issues between them so that the court may be informed of the exact points in controversy and to that end provision has been made for defining the issues in a case where such a course seems necessary;

(13) The parties have been given every opportunity consistent with their substantive rights to obtain promptly the facts necessary for trial and to determine all preliminary questions so far as practicable at one time;

(14) In order to provide for so-called commercial cases, provision has been made for summary judgment in appropriate cases and for early trial where such a course is in the interest of speedy justice;

(15) The new practice provides that no judgment shall be reversed or new trial granted on the ground of misdirection, for the improper admission or exclusion of evidence or for error as to a matter of pleading or procedure unless after examination of the whole case it shall appear that the error injuriously affected a substantial right of a party;

(16) A mistake, irregularity or defect in any of the proceedings which does not affect a substantial right of a party is required to be disregarded in the interest of justice;

(17) A new form of summons has been authorized, namely, a "summons to appear" which will be applicable to certain causes of action and which will require the

defendant to appear on a specified day and submit his defense, similar to the practice in inferior courts;

(18) Provision has been made for the submission to the court for construction of a statute, municipal ordinance or written instrument with notice to the parties interested;

(19) Voluntary informal submission of a controversy to a trial court or judge with or without pleadings and without regard to technical rules of evidence and procedure has also been provided for;

(20) The proceedings in aid of execution known as supplementary proceedings have been liberalized and made an effective instrument for reaching property that can not now be reached by legal execution and thus obviate so far as possible the necessity for resort to a creditor's action;

(21) The provisions for substituted service have been stripped of their technical character and rules have been prepared authorizing the court to direct such substituted service as may serve to give the best notice under the circumstances of each case;

(22) The subjects of arrest, attachment, injunction, replevin and receiver have been very much simplified;

(23) Examinations before trial have been made an effective instrument for the perpetuation of testimony and the obtaining of evidence in preparation for trial.

(24) In order to render the provisions readily accessible and easily understood they have been grouped under appropriate heads and arranged according to the steps in the progress of an action from its commencement to its termination and enforcement.

Other Features of the New Practice

These features and many others which appear in the body of the report we believe will put an end to disputes over procedural rights which has occupied so much of the time of the courts and will direct the attention of the bench and bar to the prompt determination of the substantive rights of the parties.

Methods Provided for Presenting Controversies

The following methods of presenting controversies in the courts have been provided in the new practice:

(1) Voluntary submission to a trial court or judge thereof with or without pleadings and with such procedure as may be agreed upon;

(2) Voluntary submission upon an agreed state of facts to the appellate division;

(3) Submission for construction of a statute, municipal ordinance or written instrument with notice to the parties interested, other than the applicant.

(4) Voluntary informal arbitration by agreement of parties, with or without an appeal to the courts;

(5) Summons to appear upon eight days' notice unless a shorter period is directed by the court, applicable to certain classes of actions;

(6) Summons to answer upon twenty days' time unless extended, being the usual method for commencing an action in the supreme and county court.

Mediation and Conciliation

The modern idea of mediation and conciliation by the courts to save the time and expense of litigation is embodied in the provisions permitting the court to require

the parties to appear before it for the purpose of a settlement when either party has made a tender or offer; and allowing the parties to appear voluntarily before the court and submit to a determination by the court or by arbitrators without regard to technical rules of pleading or evidence.

Existing Rights and Litigation

Pending litigation will be continued under the existing practice unless the parties otherwise stipulate, but any new proceedings will be conducted under the new practice. All existing substantive rights and the terms and tenures of office have been preserved.

Divisions of Report

The report has been divided for convenience into three volumes which are herewith submitted:

(1) Volume one consists of the general practice, such as the Civil Practice Act and the Civil Practice Rules and the notes thereto;

(2) Volume two consists of the special practice, such as the surrogate's and justice's of the peace and the notes thereto;

(3) Volume three consists of the substantive law now in the Code of Civil Procedure which has been transferred to new or existing Consolidated Laws.

Notes and Tables

The notes show the sources of the text of the practice act and rules and a table will be prepared showing the disposition of each provision of the Code of Civil Procedure.

Rules of Court

The board has proceeded upon the assumption that the courts have the power under the present constitution to make rules of court governing the civil practice but the right to make such rules in particular instances has not always been clear and the doubt should be removed by a constitutional provision so far as it is practicable to do so.

Reorganization of the Courts

The board has not deemed it within its province under the legislative act governing its power to make or even to suggest a change in the organization of the courts of the state and respectfully refers the subject to the constitutional convention for such action as may seem proper.

Constitutional Convention

If the proposed act, rules and statutes embodying the new practice are laid over until the session of the legislature succeeding the action of the people of the state upon the constitution which will be proposed by the constitutional convention, changes can then be made to conform to any new provision contained in the constitution, if adopted, and to any suggestions made by the bench and bar of the state.

Jury Trial

The right to a jury trial which has grown into greater confusion with each succeeding constitutional convention has not been abridged in any way by the new practice, but provision has been made in the practice act for the exercise of that right pursuant to a demand therefor after issue joined.

References

No change has been made in the practice relating to references, that subject having been left to be treated by the legislature after the action of the constitutional convention on the judiciary article.

Short Forms

Short forms of pleading and other legal papers will be prepared as a guide to the profession and as a means of avoiding the technical and cumbersome forms which so generally prevail.

Convenient Arrangement

The rules have been arranged logically according to the steps in the progress of an action so that the provisions can readily be found.

Special Practice

This revision will not disturb the practice in the Surrogate's Court, Justice's Court, Municipal Court of the City of New York, City Court of the City of New York or the practice in any other city court, but the same will remain as heretofore until changed to conform to the new practice.

The distribution of the material in the code in separate statutes such as the Surrogate Court Act, Justice Court Act, Civil Rights Law, Evidence Law, Costs, Fees, Disbursements and Interest Law will not cause any inconvenience, as these statutes can be bound together in one "practice manual," if it should be found convenient

to do so, and at the same time they can be printed as separate acts.

Substantive Rights

The substantive matter in the Code of Civil Procedure has been distributed to appropriate Consolidated Laws so far as practicable and such provisions as did not seem to find a place properly in any of the existing Consolidated Laws, have been placed in the Civil Rights Law.

In drafting the new Consolidated Laws, such as the Evidence Law and Costs, Fees, Disbursements and Interest Law, the material has been arranged alphabetically, which the board believes will be found much more convenient than any attempted analytical arrangement of the material.

In distributing the substantive matter to new or existing Consolidated Laws no intended change has been made in substantive rights.

Suggestions and Advice

The report is presented to the legislature of 1915 for publication and circulation in order to obtain the benefit of suggestions and advice, which are earnestly and respectfully solicited, so that the act, rules and proposed statutes herewith presented may be put in final form for action at the opening of the legislature of 1916.

Repeal of Code of Civil Procedure

This report involves the repeal of the entire Code of Civil Procedure and the substitution in its place of (1) a practice act, (2) rules of court and (3) relegating substantive matter to new or existing Consolidated Laws.

When to Take Effect

If, in its final form, the work of the board shall be found satisfactory, it is suggested that it be adopted at the beginning of the session of 1916, to go into effect on the first day of September, 1916, which will give the bench and bar an opportunity to familiarize themselves with its provisions and govern themselves accordingly.

Acknowledgments

Acknowledgment is due to all who have aided the board with suggestions and advice to Miss Blanche B. Brown for valuable services in the preparation of this report.

Respectfully submitted,
ADOLPH J. RODENBECK
JOHN G. MILBURN
ADELBERT MOOT
CHARLES A. COLLIN
Board of Statutory Consolidation.

Dated April 1, 1915.

APPENDIX B

CIVIL PRACTICE ACT ACCOMPANYING THE REPORT

AN ACT FOR THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF THE STATE OF NEW YORK

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. This act shall be liberally construed and the rule that statutes in derogation of the common law must be strictly construed shall not apply.

§ 2. This act shall be known as the "Civil Practice Act," and except as otherwise provided shall apply to and govern the civil practice in all of the courts of the state and the judges thereof, the jurisdiction and powers of each of which shall remain as they now are except as modified herein.

§ 3. The court or judge within their respective jurisdictions shall have all the powers, though not expressly conferred by statute or rules, necessary to the determination of legal controversies and the rights of the parties according to the justice of the case; and to the enforcement of their orders, decrees and judgments by execution and otherwise.

§ 4. There shall be but one form of civil action under this act in all the courts subject to this act which shall

be called an "action"; but this provision shall not apply to proceedings otherwise specially regulated by other statutes which shall be called "special proceedings."

§ 5. The procedure in the courts governed by this act shall be according to this act and rules of court to be made and modified from time to time as herein provided, and in cases where no provision is made by statute or by rules the proceedings shall be regulated by the court or judge before whom the matter is pending.

§ 6. In order to give effect to the provisions of this act and otherwise to simplify procedure, the convention of justices assigned to the appellate division shall have plenary power to make, alter and amend rules of practice and procedure from time to time, not inconsistent with law, binding upon all courts of the state and the judges and justices thereof (except the court of appeals, unless otherwise expressly stated, and the court for the trial of impeachments) which shall be called the "Civil Practice Rules"; but the courts of record may make such rules necessary to carry into effect the powers and jurisdiction possessed by them, not inconsistent with the foregoing rules, as they may deem necessary.

§ 7. Until general rules of practice shall be made as herein provided, the rules hereto annexed shall be the rules of the courts governed by this act subject to such changes and additions as the courts may make from time to time.

§ 8. Non-compliance with any of the Civil Practice Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and

upon such terms as the court or judge shall think fit.

§ 9. The practice in the courts shall be made as uniform as possible, and general provisions applicable to more than one step in an action shall be broad and liberal in terms, shall omit minute details, contain as few exceptions as possible and leave as wide a discretion in the courts as practicable.

§ 10. In the interest of justice, at any stage of the case, a mistake, irregularity or defect in any of the proceedings in an action or proceeding which does not affect a substantial right of a party shall be disregarded.

§ 11. No action or proceeding shall fail or be dismissed on the ground that a party therein has mistaken the court, venue, remedy or procedure, if jurisdiction exists to grant the proper remedy; but in such case, upon terms, the matter shall be transferred to the proper court or place of trial and the pleadings and other proceedings shall be so amended or new pleadings or other proceedings so issued, filed or taken, that the whole matter in controversy between the parties may be completely and finally determined.

§ 12. In addition to the present powers of amendment, the statement of a new or different cause of action in the complaint or counterclaim may be permitted, before or at the trial, upon suitable terms.

§ 13. For the purpose of expediting the determination of controversies, actions may be consolidated and severed wherever it can be done without prejudice to a substantial right.

§ 14. The courts shall always be open for the transaction of business and a term of court shall continue until a succeeding term although the court is not actually in session. A stated term of court is the period desig-

nated for the term and during which the court is actually sitting. The use of "special" term shall be discontinued and trial terms shall be designated as jury terms and court terms. A term for the hearing of motions shall be known as a motion term. The distinction in form between a court order and a judge's order heretofore made is abolished and an order whether issued by a court or a judge shall be the same in form. An order, where authorized to be issued by the court, unless otherwise provided, may be issued by a judge thereof.

§ 15. Subject to rules, the statutory costs in all cases may be imposed or disallowed by the court or a judge.

§ 16. Whenever the business before the court requires it, a suitable classification of causes under appropriate heads and a distribution of cases among the judges accordingly shall be made so as to vest in the court a greater control over the work before it, facilitate the dispatch of business and obviate delays.

§ 17. The practice in the rules shall be arranged according to a logical classification following the steps in the progress of an action and so that the provisions upon the same subject, so far as practicable, shall be found together.

§ 18. Wherever a suitable filing, docketing and indexing system for papers in actions and proceedings is not in use one similar to that required in New York County by Laws 1912, chap. 344 (Code of Civil Procedure, § 1245a), shall be required by rules of court so that so far as practicable a uniform system may be applied throughout the state.

§ 19. Any number of causes of action or counterclaims may be set up in the same complaint or answer, subject to an order for a separate trial of any issue,

where it may be deemed expedient or necessary. No action or defense shall fail in whole or in part because a party has an adequate remedy at law therefor; but the court may grant such relief in law or equity, with or without a jury as the case and justice may require.

§ 20. The joinder of all parties plaintiff and defendant claiming an interest in the subject of the action, whether jointly, severally or in the alternative, shall be permitted subject to an order for a separate trial as to any party and to suitable penalties for misjoinder. The people of the state may be made a party defendant in actions or proceedings affecting real property in which the people have an interest.

§ 21. Every action shall be prosecuted in the name of the real party in interest, but an executor, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought; but, at any stage of the action, any persons may be brought in as parties, either in addition to or in place of the previously existing parties.

§ 22. No action shall be defeated by the non-joinder or misjoinder of parties; but new parties may be added and parties misjoined may be dropped, by order, at any stage of the cause, as the ends of justice may require.

§ 23. Where a complete determination cannot be had without the presence of other parties, they shall be brought in and where a person, not a party, has an interest or title which the judgment will affect, he shall be made a party.

§ 24. The process and pleading shall be less formal

and less technical, and, being strictly matters of procedure, shall be regulated by court rules instead of by statutory rules, and shall be as uniform as possible.

§ 25. There shall be prepared, as a part of the rules, short forms, for pleadings and other papers generally used in court proceedings but no technical objection shall be raised to any paper on the ground of any alleged want of form.

§ 26. Defendant in his answer and plaintiff in his reply shall be required by his pleadings to point out the actual issues between them.

§ 27. The demurrer shall be abolished and all relief for defective pleading shall be by motion.

§ 28. The substituted service of papers shall be made in the manner directed by rules as best suited to give notice of the proceedings.

§ 29. Every opportunity shall be afforded consistent with the substantive rights of the parties to determine all preliminary questions and to obtain promptly the facts necessary for trial.

§ 30. Whenever an application shall be made before trial for an order and it shall appear that the matter in controversy in the action or proceeding is one which can be most conveniently dealt with by an early trial, without first going into the whole merits on affidavit or other evidence for the purposes of the application, an order for such trial may be made, and in the meantime such order may be made as the justice of the case may require. Subject to rules, an early trial without regard to the date of issue may be ordered in any case.

§ 31. Suitable rules shall provide for the summary disposition of all matters of procedure subsidiary to the actual controversy between the parties.

§ 32. The general motion to determine the preliminary relief of which a party is entitled before trial shall be made mandatory as to all such matters, including pleadings, parties, admissions, discovery, interrogatories, inspection, commissions, examinations and place and mode of trial, subject to rules as to appeal, and subsequent relief upon terms.

§ 33. Full power shall exist to make rules for expediting the selection of the jury and the practice shall provide for the fullest opportunity at the trial for getting at the real facts at issue; and the facts shall be determined so far as practicable upon one trial.

§ 34. The right to a jury trial as provided in the constitution is hereby recognized but such right shall be exercised by a written demand therefor made within ten days after the cause is at issue (or in a case where a summons to appear will issue, on the return day thereof); and if not so made it shall be deemed to have been waived; but a jury trial may be had, by order, of any issue of fact notwithstanding such waiver, or a jury trial may be dispensed with by order, in a case where the right to dispense with a jury trial now exists.

§ 35. The practice of taking "exceptions" to a ruling, verdict, report or decision upon a trial or hearing shall be discontinued, but this shall not obviate the necessity of making suitable objections to apprise the judge or referee of the specific points of law or fact in question.

§ 36. The unconditional dismissal of a complaint or counterclaim at the close of the evidence shall bar a new action between the parties or their privies on the same cause of action or counterclaim.

§ 37. A verdict may be directed upon the trial where

a contrary verdict would be clearly against the weight of evidence.

§ 38. Causes shall be submitted to the jury so that another trial of the same facts may be obviated so far as practicable.

§ 39. Counsel shall submit requests to charge in advance, if the judge so desires, but such a submission shall not impair the right to make oral requests.

§ 40. With a view to determining finally upon one trial so far as practicable the facts in a case and to avoid retrials of questions of fact so far as practicable, special verdicts subject to rules shall be resorted to wherever the case warrants such a course.

§ 41. The practice shall provide for the prompt disposition of any frivolous or sham defense, and for granting summary relief and for rendering judgment in favor of a party as against any other party at any stage of the action, which will, so far as practicable, dispose of the controversy between the parties.

§ 42. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and the ultimate rights of the parties on each side as between themselves may be determined; and when a complaint or a cause of action is sustained in favor of or against only a part of the parties thereto, judgment may be rendered in favor of or against such parties respectively at any stage of the proceedings.

§ 43. Judgment may be taken as to any part of a claim, and the action may proceed as to the remainder, where a part of the answer or reply is struck out or the answer or reply admits a part of a claim, leaving such part uncontested, or in any other case where such a course is in the interest of justice.

§ 44. Wherever an answer is served in an action brought to recover a debt or liquidated demand arising upon a contract express or implied, sealed or unsealed, or, upon a judgment for a stated sum, or, upon a statute, the practice shall provide that the answer may be struck out and that judgment may be entered upon motion and affidavit, as may be provided by rules.

§ 45. Where in the course of an action or proceeding an accounting, appraisal, partition, sale or other act is required to give effect to an order of the court and to prepare for judgment, a reference to one or more persons may be had for that purpose subject to such terms as the court may deem proper.

§ 46. Wherever the parties have an interest in real property sought to be admeasured or partitioned, the court may direct that the premises be admeasured or partitioned and that the share of each party be set aside for him or where such an admeasurement or partition can not be made in justice to the parties, the court may direct a sale of the premises and a division of the proceeds as justice may require.

§ 47. The practice shall contain such provisions as may be practicable, without impairing the right of trial by jury, directing appellate courts to disregard on appeal, mistakes, irregularities and defects not affecting substantial rights, and generally, to determine the issues according to the right and substance of the case.

§ 48. The review of an intermediate decision in the nature of the present interlocutory judgment, except by the consent of the court or judge granting the same, shall be limited to the appeal from the final judgment.

§ 49. The appeal from a judgment shall present all

the questions of fact and law in the case which the court has jurisdiction to review without regard to whether or not an appeal has been taken from the decision upon the motion for a new trial.

§ 50. The trial judge is authorized upon a motion for a new trial to direct such a judgment, notwithstanding the verdict, as should have been entered in the action at the time of the trial.

§ 51. No judgment shall be reversed or new trial granted on the ground of misdirection, for the improper admission or exclusion of evidence, or for error as to a matter of pleading or procedure unless after examination of the whole case it shall appear that the error injuriously affected a substantial right of a party.

§ 52. There shall be a retrial not of the whole case in every instance but only of such questions with respect to which an error was committed, if separable. When a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages and shall stand good in all other respects.

§ 53. In all cases, where it can be done constitutionally, the appellate courts may receive further evidence, allow amendments of pleadings or process and adopt any procedure not inconsistent with this act which it may deem necessary or expedient for a full and final hearing and determination of the cause.

§ 54. The appeal shall be deemed to remove to the appellate court the entire proceedings in the court below, including the stenographer's minutes and all orders, documents and other proceedings made, taken or filed therein, but rules shall provide for the elimination of all unnecessary matter and the settlement of the record

on appeal so as to avoid so far as possible useless delays and expense.

§ 55. The provisions for the satisfaction of judgments and of orders shall be such as to afford a prompt and effective enforcement thereof, and such that the judgment debtor may not be harassed by unnecessary executions or proceedings in relation thereto.

§ 56. A court or a judge is not authorized to extend the time fixed by law within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a disability; or the time fixed by the court within which a supplemental complaint shall be made in order to continue an action; or an action is to abate unless it is continued by the proper parties. A court or a judge cannot allow any of those acts to be done after the expiration of the time fixed by law or by the order as the case may be for doing it; except where a party entitled to appeal from a judgment or order or to move to set aside a judgment for error in fact, dies before the expiration of the time within which the appeal may be taken or the motion made, the court may allow the appeal to be taken or the motion to be made by the heir, devisee or personal representative of the decedent at any time within four months after his death.

§ 57. A person claiming to be interested under a deed, will or other written instrument, or in the enforcement of a statute or municipal ordinance, may apply to the supreme court or a judge thereof by "summons to appear" for the determination of any question of construction or validity arising under the instrument, statute or ordinance, and for a declaration of the rights of the persons interested. The court or a judge may direct

such persons to be served with the summons as may seem necessary. The application shall be supported by such evidence as the court or a judge may require. The court or judge shall not be bound to determine any such question of construction if it ought not to be determined in such manner.

§ 58. Parties may submit to a trial court or judge having jurisdiction of the subject in controversy a matter in difference between them in person or by attorney upon oral or written pleadings or statements to be tried by the court or set down for trial before a referee or arbitrator or before a jury under such procedure as to evidence and appeal and otherwise as may be agreed upon.

§ 59. The enactment of any matter now in the Code of Civil Procedure as independent statutes or the incorporation of any such matter in any of the Consolidated Laws pursuant to the plan for the simplification of the practice shall not impair or otherwise affect any substantive right in any statute, general, special, private or local, in force at the time of the adoption of this act unless it clearly appears that a change was intended.

§ 60. This act and the rules adopted thereunder shall not supersede the procedure in any court, regulated by any other statute or rules adopted thereunder, but such statute and rules shall continue to govern the practice in such court; and when the practice in the Code of Civil Procedure or the General Rules of Practice has been incorporated in any such statute by reference, the provisions shall be deemed in force for the purposes of such reference notwithstanding their repeal by this act; but where the procedure in any court or in any action or proceeding is not otherwise specially regulated it shall

be governed by the provisions of this act and the rules adopted in compliance therewith so far as applicable.

§ 61. Proceedings heretofore taken pursuant to law in any action or special proceeding shall not be rendered ineffectual or impaired by this act or by the rules adopted in accordance therewith, or by the repeal of any statute or part of a statute thereby, unless otherwise expressed, and subsequent proceedings in such action and special proceeding shall be conducted as provided by the practice applicable thereto, prior to the adoption of this act; subject to such relief by order with respect thereto as the court or a judge thereof in which the action or special proceeding is pending may direct; and if necessary to that end the statutes in force when this act takes effect shall be deemed in force, notwithstanding the repeal thereof.

§ 62. No action or proceeding shall fail by reason of an omission to make necessary changes in the language of any statute or rule to conform to the new practice or by reason of any clerical error but such omission or error in the statute or rule shall be supplied by the court to carry out the true intent and purpose of the plan for the simplification of the practice as reported to the legislature in connection with this act; nor shall any act, right, liability, penalty, forfeiture, punishment or defense fail because of the adoption of the new practice, but the same may be asserted, enforced, prosecuted or inflicted under the laws in force before the adoption of this act, if necessary to prevent a failure of justice.

§ 63. Statutes and amendments of statutes, other than those regulating the procedure in particular courts, enacted as a part of the plan for the simplification of the civil practice shall apply to all the courts of the state,

civil or criminal, and to all actions and proceedings, civil or criminal, so far as applicable, unless the contrary clearly appears from the context or the subject matter is specially regulated for any court, action or proceeding.

§ 64. The enactment of any statute or rule forming a part of the plan for the simplification of the civil practice, or the repeal of any statute or part of a statute thereby, shall not affect or impair any act done or right accrued or acquired, or any liability, penalty, forfeiture or punishment incurred or imposed, or any limitation or defense incurred prior to its enactment or adoption, but the same may be asserted, enforced, prosecuted or inflicted as provided herein or by the statutes and rules forming a part of the plan for the simplification of the civil practice or by other statutes as the case may be.

§ 65. A reference in any statute, other than a statute regulating the procedure of any court, to the Code of Civil Procedure, or to the General Rules of Practice shall be deemed to be a reference to the appropriate provision enacted or adopted, whether revised or not, as a part of the plan for the simplification of the civil practice, and where the practice in the Code of Civil Procedure or the General Rules of Practice has been incorporated heretofore in any such statute by reference, the reference shall be construed to refer to the new practice on that subject.

§ 66. This act shall not affect the title or tenure to any office or employment or the salary or emoluments thereof, but the same shall continue as heretofore until modified or abolished.

§ 67. A provision of an existing statute enacted as a part of the plan for the simplification of the civil practice shall be construed as having been enacted as of the

time when it originally became a law and in case of subsequent amendment as of the date of the enactment of the amendment.

§ 68. For the purpose of determining the effect of the various provisions of this revision, all of the statutes and rules enacted during the year 1916, as a part of the plan for the simplification of the practice pursuant to chapter 713 of the laws of 1913 shall be deemed to have been enacted simultaneously.

§ 69. The term "new practice" refers to the statutes, rules and forms enacted by the legislature or promulgated by the courts as a part of the plan for the simplification of the civil practice pursuant to chapter 713 of the laws of 1913 and amendments and additions to such statutes, rules and forms enacted or promulgated from time to time thereafter.

§ 70. Chapter 448 of the laws of 1876 and chapter 178 of the laws of 1880 and all statutes amendatory thereof and supplementary thereto, together constituting the Code of Civil Procedure are hereby repealed.

§ 71. This act shall take effect on the first day of September, nineteen hundred and sixteen.

APPENDIX C

REPORT OF COMMITTEE OF THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES ON BILL TO SIMPLIFY PRACTICE

MR. GARD, *from the Committee on the Judiciary, submitted the following:*

REPORT

(To accompany H. R. 9428.)

The object of the law is to obtain and maintain speedy and exact justice, and with this establish a rule of procedure in the consideration of causes in the appellate courts of the United States.

Complaint has been and is daily made of alleged miscarriages of justice because of strict interpretations of and adherence to some technical rules of procedure which could not in the least affect the substantial rights of the parties in litigation and in very many state jurisdictions statutes have been enacted almost in terms with the language of this bill, these statutes being universally considered to be of great assistance in the administration of justice in courts. Certain courts have established, and entirely within their right, we think, rules practically giving effect to the sentiment of this bill, while other courts have construed it to be their duty to reverse for any error if such error be made affirmatively to appear.

It has been truly said that "justice delayed is justice

denied," and we are all familiar with the hardships of loss of time and great expenditure of money made necessary by retrials when the first trial absolutely established the facts and the law, the reversal being for some trivial error occurring during protracted trial.

The trial of causes before juries, that fairest means of adjudication of disputes which jurisprudence has yet found, is frequently marred by long exhibits of most technical and immaterial objections, made often with no other purpose than to cloud the issues and to make weary the minds of the jurors, unmindful and unheeding of such matters so far outside any effect on the substantial rights of the parties.

Then it is almost invariably true that the first trial is the one where is brought out in the most complete manner the contentions of the respective parties established and made manifest to the minds of the jury and of the judge, and as the mind of the reasonable juror—and this is the average juror, we believe—skips over the trivial and immaterial, so the mind of the judge should be invested with this discretion and not be bound by arbitrary rule requiring reversal if any error be found.

A bill embodying the same general features and intended generally to effect the same remedy was passed by the House of Representatives in the Sixty-Second Congress but failed to pass the Senate.

Another almost similar bill was favorably reported in the Sixty-Third Congress on December 12, 1914, by Hon. E. Y. Webb, now Chairman of the Committee on the Judiciary in the House of Representatives.

Mr. Webb, in his report, adopted the language of Mr. Davis in reporting the bill to the House in the Sixty-Third Congress, as follows:

"The bill as originally drawn was prepared by a committee of the American Bar Association, by which also it has been under discussion for five years. In an amended form it passed the House of Representatives unanimously on the 6th day of February, 1911, and in the message of the President sent to Congress on December 21, 1911, we find the following recommendation:

" 'The American Bar Association has recommended to Congress several bills expediting procedure, one of which has already passed the House unanimously February 6, 1911. This directs that no judgment should be set aside or reversed or new trial granted unless it appears to the court, after an examination of the entire case, that the error complained of has injuriously affected the substantial rights of the parties, and also provides for the submission of issues of fact to a jury, reserving questions of law for subsequent argument and decision. I hope this bill will pass the Senate and become a law, for it will simplify the procedure at law.'

"Similar legislation to that now proposed has been adopted in Illinois, Kansas, Ohio and Wisconsin, and by constitutional amendment in California; has passed both houses of the legislature of the State of New York, and on the 2d day of April, 1912, was before the Governor of that state for his signature.

"No doubt a similar rule has been applied without express statutory mandate in the courts of other states. The necessity of federal legislation on this subject is well illustrated by a comparison of the language of the Supreme Court of the United States in the case of Railroad Company vs. O'Reilly (158 U. S. 334) and its language in the case of Cunningham vs. Springer (204 U. S. 647). In the former of these cases it is said:

" 'While an appellate court will not disturb a judgment for immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting.'

"On the other hand, in the latter case it is said:

" 'These three illustrations * * * illustrate the importance of a strict application of the principle that the excepting party should make it manifest that an error prejudicial to him has occurred in the trial, in order to justify an appellate court in disturbing the verdict.'

"In other words, in the first of these cases the Supreme Court holds that an error is presumed to be prejudicial until the contrary appears, and in the second that an error is presumed to be harmless until the contrary is made to appear. It is the purpose of the first section of the present bill to enact, in so far as the appellate courts are concerned, that in the consideration in an appellate court of a writ of error or an appeal judgment shall be rendered upon the merits without permitting reversals for technical defects in the procedure below and without presuming that any error which may appear had been of necessity prejudicial to the complaining party.

"Your committee believe that the reforms embodied in this bill are wise and consonant with the promise of Magna Charta—that justice shall be denied or delayed to no man and that the administration of justice shall not be so cumbrous, dilatory and consequently expensive that it shall be obtainable only by the rich."

This bill has the approval of the committee appointed by the American Bar Association to present remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation.

APPENDIX D

EXTRACT FROM REPORT OF THE COMMITTEE ON THE LAW REPORTING AND DIGESTING OF THE AMERICAN BAR ASSOCIATION ON WHAT DECISIONS SHOULD BE REPORTED

To the American Bar Association:—

With regard to the restriction of the volume of the reports, there has been a concurrence of opinion that something must be done to meet conditions which are becoming intolerable, and yet there has been great difference of opinion as to what the remedy should be. Plans earnestly urged by some have been as strongly opposed by others.

On the one hand, there is the opinion that the Bar is entitled to know what has been decided by the courts, and on the other, that they must not be burdened with the purchase or the examination of opinions which are of no value or precedent in the development of the law. The truth is that conditions vary in different parts of the country, and a scheme that would prove entirely satisfactory in the older states would probably be impracticable in the newer states of the West. In these states where the average questions have been settled by repeated decisions, it may well be that a majority of the current cases should remain unreported, but in the newer states, where many questions are still unsettled by judi-

cial decision, nearly every case has some feature which may be of interest to the Bar.

In Nebraska, they tried the experiment of allowing the judges to designate what cases should not be reported, and this was done with the cordial concurrence of the Bar; but after a year's trial, the Bar Association unanimously requested that the rule should be abrogated, and since then all the decisions have been reported.

The fact remains, however, that with the reporting of all the decisions of the higher courts only, the volume of the reports will become intolerably large, and the Bar of the whole country is interested in having the case law of all the states kept within reasonable limits, and this Association must continue to urge the necessity of taking some means to avoid the undue expansion of the reports.

The absolute control of the publications of their decisions ought not to be left with the judges themselves, and your committee last year was unwilling to approve of a resolution recommending this method of restricting the volume of the reports; but they did suggest, and respectfully insist, that the judges could do much to relieve the situation. There are many cases in which a brief statement of the facts and the legal principles applied to them, with a reference to the authorities, would serve as well as a long opinion, and there is no need of long discussions of legal questions which have been substantially settled in earlier cases, nor of making long quotations from existing reports; and the judges may aid the reporters by designating the decisions which they think should not be reported, and especially by indicating the passages discussing the evidence, which may be omitted, stating only the conclusions.

It is with the reporters, however, that the burden of

selecting and condensing the reports really rests, and the responsibility for making the selection is not one that the reporter willingly assumes. We have no council of law reporting here as they have in England, and the reporters do not represent the Bar, and they cannot, as individuals, exercise even their best judgment in withholding opinions from publication.

The reporters, as such, are not represented in this Association, and we have no control over their work, but we may suggest and ask that they should, in the first place, bear in mind that the reports are intended primarily as books containing the precedents in the development of the law. They are not for the information of the parties and counsel. The filed opinions are sufficient for that purpose. The purpose of a reported case is to serve in some way for the illustration or development of legal principles, which, on such cases, is often a matter of doubt. But there are many cases as to which there is no doubt. These cases, at least, should not be reported.

Opinions which are merely discussions of the evidence and conclusions of fact ought not to be reported in full. If they are reported at all, a summary of the facts and a statement of the conclusions is all that should be printed. There are many opinions containing conclusions of law that are of no value in the reports. There are cases in which familiar rules of law are applied to an ordinary state of facts, and unless the decision is that of a court of final appeal, a competent reporter may safely exercise his judgment in excluding these from the reports. Where a case contains a long discussion of the evidence, as well as an examination of the law, the report may be shortened by stating that the court

considered the evidence and reached a certain conclusion.

There are many ways in which a competent reporter may restrict the volume of the reports without depriving the profession of any case or any point in any case that is of any real value to any one, but the important matter is that it should be understood by reporters and by those who appoint them that the work of reporting requires knowledge and good judgment and no little patience and care. Some selection and condensation of the filed opinions must be made, and a good reporter must be able and willing to take the trouble to exclude from the reports cases which are of no permanent value to the profession.

In England, where the decisions are comparatively few, the greatest care is taken to have the reports contain only such decisions as are of real value and to condense the reports as far as is consistent with a clear understanding of the facts. The reporters are chosen by the Bar and feel themselves to be responsible to the Bar for the quality of the reports. And the greatest care is taken that the quality is not diminished by reason of the quantity. The choice of cases and the condensation of the reports is made a matter of careful consideration by well-trained men working together under well-recognized principles. Our state reporters have not the advantage of such coöperation, but in what is known as the Reporter System there is an organization in which competent men may be trained to work together upon a definite plan, and the profession has a right to ask and expect that these reports shall be made in view of the real purpose of reporting, and that opinions and parts of opinions that are of no use for that end shall

be omitted. If the quality, rather than the quantity, of the reports is made the primary object, the value of the reports will be increased and the profession will be relieved of much useless labor and expense.

There is another way in which the volume of the reports can be reduced, and that is by reducing the number of the decisions, and this can be done without loss to any one by avoiding controversy over questions of practice. The practice is merely the machinery of the law, and the simpler it is the better. It has been found by experience that the attempt to regulate the practice in detail by elaborate codes of procedure has given rise to a large amount of litigation, and a very large proportion of the reports in the states having codes of procedure are occupied with cases on the construction of the statutes relating to matters of practice. It has been suggested by lawyers and by Bar Associations in the code states that the attempt to prescribe by statute the details of procedure be abandoned, and that in place of the codes there be enacted a statute giving a general outline of the procedure based upon the common law in existing traditions in the several states, and leaving details to be regulated by rules of court as occasion may require.

Rules of court are more flexible and are subject to judicial discretion and leave the court free to do substantial justice. Under such practice acts as those of Connecticut or New Jersey, and the rules of equity in the federal courts, for example, there is little controversy over questions of practice. Your committee is satisfied that the codes are responsible for a large part of the volume of the reports and believes that there is no more effective means of reducing the number of decisions than

the simplification of the rules of practice by adopting short practice acts with rules of court in place of the elaborate codes of procedure.

EDWARD Q. KEASBEY
WILLIAM T. BRANTLY
ALEXANDER NEW
JOHN MORRIS
ROSCOE POUND
Committee.

APPENDIX E

EXTRACTS FROM PRESIDENTIAL ADDRESS OF ELIHU ROOT TO THE AMERICAN BAR ASSOCIATION AT ITS ANNUAL MEETING, AUGUST, 1916

There is great economic waste in the administration of the law viewed from the standpoint of the nation and of the states. There is unnecessary expenditure of wealth and of effective working power, in the performance of this particular function of organized society. We spend vast sums in building and maintaining court houses and public offices and in paying judges, clerks, criers, marshals, sheriffs, messengers, jurors, and all the great army of men whose service is necessary for the machinery of justice, and the product is disproportionate to the plant and the working force. There is no country in the world in which the doing of justice is burdened by such heavy overhead charges or in which so great a force is maintained for a given amount of litigation. The delays of litigation, the badly adjusted machinery, and the technicalities of procedure cause enormous waste of time on the part of witnesses and jury panels and parties. The ease with which admission to the Bar is secured in many jurisdictions and the attraction of a career which affords a living without manual labor has crowded the Bar with more lawyers

than are necessary to do the business. Of the 114,000 lawyers in the United States according to the census of 1910, a very considerable part are not needed for the due administration of justice. If that business were conducted like the business of any great industrial or transportation company which is striving for the highest efficiency at the least cost in order to compete successfully with its rivals, a very considerable percentage of the 114,000 would be discharged. We at the Bar are not producers. We perform indeed a necessary service for the community; and to the extent of that necessary service we contribute towards the production of all wealth and the effectiveness of all energy in the community, and we take toll, rightly, from all the property and business in the community for the service. Superfluous lawyers, however, beyond the number necessary to do the law business of the country, are mere pensioners and drags upon the community and upon all sound economic principles ought to be set to some other useful work. There is plenty of work for them to do on the farms of the country.

Why is it that these defects exist in American administration of justice? The American people are not quarrelsome or litigious. They are good natured, practical, simple and direct in their methods of transacting their individual business, respecters of law, and honest in their dealings. Our Bar as a whole is courageous, loyal, and able. Our judges as a whole are just, high minded, and competent. Why do we transact the business of administering justice in such an unbusinesslike way? It is not difficult to point out particular laws and methods which are defective and to say that they ought to be changed, but there is still the question, how did they

become defective, and why, after all our experience, do they continue defective?

I think the underlying cause of this defective administration of justice is that the Bar and the people of the country generally, proceed upon a false assumption as to their true relation to judicial proceedings. Unconsciously, we all treat the business of administering justice as something to be done for private benefit instead of treating it primarily as something to be done for the public service. The administration of law is affected by that same general attitude which I have mentioned in which citizens think about what they are going to get out of their country instead of thinking of what they can contribute to their country. Our political system makes such an attitude on the part of the Bar very natural and easy. With our highly developed individualism, our respect for the sanctity of individual rights, our conception of government as designed to secure those rights, it is quite natural that lawyers employed to assert the rights of individual clients and loyally devoted to their clients' interest should acquire a habit of mind in which they think chiefly of the individual view of judicial procedure, and seldom of the public view of the same procedure. It is natural that the same habit of thought should be carried into our legislatures by the lawyers, who make up the greater part of those bodies; and with our governments of narrow and strictly limited powers it is natural that there should be a continual pressure in the direction of promoting individual rights and privileges and opportunities and very little pressure to maintain the community's rights against the individual and to insist upon the individual's duties to the community. There are indeed two groups of men

who consider the interests of the community. They are the teachers in the principal law schools and the judges on the Bench. With loyalty and sincere devotion they defend the public right to effective service; but against them is continually pressing the tendency of the Bar and the legislatures and in a great degree of the public, towards the exclusively individual view.

The public tendency is exhibited at the very beginning of the whole business in permitting admissions to the Bar without adequate education and training. Few ideas have been more persistent throughout this country than the idea that the prevailing consideration in determining admission to the Bar should be that every young man is entitled to his chance to be a lawyer and that all requirements of attendance in offices and law schools and for difficult examinations are so many obstacles in the way of liberty and opportunity, defenses of aristocratic privilege and derogations from democratic right. The law schools have been slowly winning their way along the lines of better training for the Bar, but the progress is very slow and the pressure for brief and easy ways to get a license to practice is continuous. Only last year the Massachusetts legislature, by statute, reduced the requirements of school attendance for admission to the Bar to two years of evening high school, following upon an agitation carried on in support of the principle, "Let every man have his chance." One of our states, and a very great state indeed, with a very high average of general cultivation, permits any one of good moral character to practice law. Correspondence schools of law flourish, proceeding upon the idea that a man can become a lawyer incidentally by reading law books in spare hours as he goes along with his ordinary occupation. The con-

stant pressure of democratic assertion of individual rights is always towards reducing the difficulty of Bar examinations. One consequence is the excess of lawyers that I have mentioned. Another consequence is that the efficiency of our courts is reduced, their rate of progress retarded, the expense increased, their procedure muddled and involved by an appreciable proportion of untrained and incompetent practitioners; by badly drawn, confused, obscure papers difficult to understand; by interlocutory proceedings which never ought to have been taken and proceedings rightly taken in the wrong way and inadequately presented; by vague and haphazard ideas as to rights and remedies; by ignorance of the principles upon which our law of evidence is based; by ignorance of what has been decided and what is open to argument; by waste of time with worthless evidence and useless dispute in the trial of causes; by superfluous motions and arguments and appeals; and by the correction of errors caused by the blunders of attorneys and counsel. In many jurisdictions there is a considerable percentage of the Bar whose practice causes the courts double time and labor because the practitioner is not properly trained to use the machinery furnished by the public for the protection of his clients. In the meantime other litigation waits and the public pays the expense. There is another evil arising from defective education. These half-trained practitioners have had little or no opportunity to become imbued with the true spirit of the profession. That is not the spirit of mere controversy, of mere gain, of mere individual success. To the student of the law, there come from Hortensius and Cicero, and Malesherbes and De Seze, and Erskine and Adams, from all the glorious history of the profession of advocacy,

great traditions and ethical ideals and lofty conceptions of the honor and dignity of the profession, of courage and loyalty for the maintenance of the law and the liberty that it guards. It is to a Bar inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning and subtle and technical or seeking unfair advantage—a Bar jealous of the honor of the profession and proud of its high calling for the maintenance of justice—that we must look for the effective administration of the law. The old customs under which the young law student was really guided and instructed in the law office of the established practitioner, under which the youth was impressed by the example and spirit and learning of his senior, are rapidly passing away. In the greater part of the country these customs no longer continue. The law school has taken the place of the law office except for acquiring the mere technique of practice, and the rights of the people of the United States to have an effective administration of the law require that the standards of the best law schools shall be applied to determine the right to membership in the Bar. When we compare our own method with the test of the three years' probation of the French Licentiate and the arduous four years' training of the German Referendar we may realize how little the American people have had in mind the protection and promotion of the public interest in requiring competency at the Bar.

No one can help sympathizing with the idea that every ambitious young American should have an opportunity to win fame and fortune. But that should not be the controlling consideration here. The controlling consideration should be the public service, and the right to win

the rewards of the profession should be conditioned upon fitness to render the public service. No incompetent sailor is entitled to command a public ship; no incompetent engineer is entitled to construct a public work; no untrained lawyer is entitled to impair the efficiency of the great and costly machinery which the people of the country provide, not for the benefit of lawyers but for the administration of the law.

The same failure to realize that the Bar has public duties as well as privileges has affected the relations which American legislation has sought to establish between the Bar and the Bench in the conduct of the business of the courts. In the hearing and decision of causes in all their stages the judge represents the public interest; the lawyers in the case represent primarily their particular clients. It is the function of the judge to promote the will of the sovereign people that justice be done to all parties before him; to see to it that the facts are really ascertained; that the law is honestly applied; that unfair advantage is not taken; that witnesses are protected against improper treatment; that the public time is not wasted. On the other hand, it is the business of the lawyer to conduct a case so that his client will win. His relations to the case tend to give him a one-sided view of what is just and fair in that case. The ardor and stress of conflict are not favorable to abstract consideration of justice. He is concerned in exhibiting the facts which will help his client; in stating the law upon which his own side relies; in breaking down witnesses against him and strengthening witnesses in his favor. On each side counsel plays the game for all that it is worth and sometimes superiority of counsel outweighs superiority of merit. Doubtless this conten-

tion, this struggle between the opposing sides of the case, is the best possible way in the long run to reach just results. But it is plain that in all the transaction the representative of public justice is the judge on the bench and that there is necessarily between him and the counsel on each side always a certain antagonism and contention. The natural tendencies of the American people emphasize this antagonism. We are restive under authority. We do not yield readily to discipline. We are unwilling to accept defeat. In every game we exaggerate the importance of success in comparison with all the rest of life. The restiveness of the Bar under the control of the judge on the bench finds its expression very widely in our legislation regarding procedure. That legislation is of course framed by the lawyers in our legislatures, and unconsciously, doubtless, their natural attitude of antagonism has led to a great multitude of provisions designed to protect the Bar against interference from the Bench.

* * * * *

The present condition of our law presents very strong reasons why lawyers should awake to a sense of responsibility for another and still more serious service which will require a Bar made strong by the application of stringent tests for admission, and by the best work of the best law schools in its training. The vast and continually increasing mass of reported decisions which afford authorities on almost every side of almost every question admonish us that by the mere following of precedent we should soon have no system of law at all, but the rule of the Turkish cadi who is expected to do in each case what seems to him to be right; and then the door would be thrown wide open for the rule of

men rather than the rule of law, and for the exercise of personal injustice as well as personal justice. We are approaching a point where we shall run into confusion unless we adopt the simple and natural course of avoiding confusion by classification, system, the understanding and application of generally recognized and accepted legal principles. The slow development of the common law with its rich product of legal ideas and remedies has followed the lines of legal principles; but at all times the application of legal principles has been conditioned upon the customs from which the law has been evolved and to which the rules established have been applied. It is no slight task for discriminating intelligence to distinguish the principles which have been applied from the incidents of their application, arising from the social and industrial and political conditions of the day, involved in the multitude of reported cases that record the progress of the common law. Yet it is continually more important that the Bar at large shall be trained to see through the precedents and the incidents to the controlling principles. A few men are already taking the lead in the work of classification—some, great teachers; some, great judges; some, great practitioners. But these few play only a small part in administering the law. Thousands of judges and tens of thousands of lawyers in all the cities and villages of this great country are doing that, and the problem of classifying and simplifying our law involves the need to carry to the great mass of them, present and future, a comprehension and discriminating understanding of the legal principles which form the thread of Ariadne for guidance through the labyrinth of decisions. How can that be done? Not by writing text books; the book stores swarm with them

already. Not by preaching reform; nobody listens. Not by the imposition of a system to be accepted, as Continental Europe accepted the Roman law. No such system would be accepted. It would be ignored. All our instincts are against it. Some very able and public spirited lawyers have been for some years urging the organization of a definite and specific movement for the restatement of our law; for a new American Corpus Juris Civilis. They are quite right. It ought to be done. But who is to do it and how shall he be recognized as a prophet? Can we elect him by popular vote? Can we select him upon our own acquaintance with men of genius and self-devotion? No. Such a man or such a group of men must be the product of natural selection. They must be evolved by the conditions of life, and they must speak to an audience prepared to listen.

The only way to clarify and simplify our law as a whole is to reach the lawyer in the making and mold his habits of thought by adequate instruction and training so that when he comes to the Bar he will have learned to think not merely in terms of law but in terms of jurisprudence. The living principle of the case system of instruction in our law schools is that the student is required by a truly scientific method of induction to extract the principle from the decision and to continually state and restate for himself a system of law evolved from its history. He is thus preparing not merely to accept formally dogmatic statements of principles but to receive and assimilate and make his own the systematic thought and learning of the world in the science of jurisprudence. With a Bar subjected generally to that process of instruction, the more general systematic study of jurisprudence would follow naturally and inevitably,

and the influence of that study would be universal; and from that condition would evolve naturally the systematic restatement of our law, by men equal to that great work. Pour sand slowly upon the level ground; the conical pile produced will have a fixed relation between the area of its base and the height of the cone. It is so with human society. We must broaden knowledge and spirit to build up and we must build up to broaden.

* * * * *

What part is the Bar to play in this great work of the coming years? Can we satisfy our patriotism and be content with our service to our country by devoting all our learning and experience and knowledge of the working of the law and of our institutions solely to the benefit of individual clients in particular cases? During all our mature lives, in many courts and upon many occasions we have been asserting rights, protecting property, preserving liberty, by appeals to the law, to the great rules of right conduct written into our constitutions; protesting against the abuse of official power, extolling justice, pleading for loyalty to our free institutions. Haven't we meant it? Has it all been mere talk of the purpose of winning cases? Have we never really cared about law and justice except as available instruments to get particular clients out of trouble? Is the Bar doing its duty and playing its part in the development of the law? As a rule the leaders of the Bar devote themselves to their individual practice. As a rule the younger and least experienced lawyers make up the state legislature. There are exceptions, but that is the rule. Even in the National Congress, although the average of ability and strength is much higher than the

public seems to suppose, comparatively few lawyers of the first order make their appearance. The questions involved in the development of the law are seldom adapted to interest an audience in political discussion. The real consideration and discussion and the mature conclusions worthy to be followed must be among the practitioners, the judges, the teachers of the law. The fitness of a people for self-government is measured by their capacity to set up and maintain institutions through which government can be carried on effectively, and responsibly. That rule applies to all large bodies of free agents having a common purpose. It applies to the 114,000 lawyers of the United States. We must have institutions through which our duty can be done if it is to be done. In response to that necessity came the associations of the Bar—the six hundred local and state associations and this great national organization. Here is at hand an institution for the public service of the profession of the law. To enlarge its membership, to improve its procedure, to increase its scope and efficacy, to strengthen its authority and its appeal in the real life of our time—these are steps by which the lawyers of all the states may rise to the high level of patriotic duty and a dignity of service worthy of a true American Bar.

APPENDIX F

REPORT OF COMMITTEE OF CALIFORNIA BAR ASSOCIATION ON "PROCEDURE BY RULE INSTEAD OF STATUTE"

To the Officers and Members of the California Bar Association:

GENTLEMEN:—

Your Special Section appointed pursuant to a resolution adopted at the annual meeting of 1915 (Proceedings, page 66) to investigate and report to the Association upon the advisability of changing the Practice Act, so that purely procedural matters may be prescribed by rules of the Supreme Court rather than by legislative enactment, respectfully submits the following report:

* * * * *

The fundamental question which the Section undertook to consider was whether, in case the present system of procedure was deemed such as to require radical change, procedure and practice should be governed by rules of Court rather than hard and fast Statutory regulations, and if so whether such rules should in the first instance be prepared by the Supreme Court or by some board or committee.

For the purpose of expressing in a concrete form the views of the Los Angeles Sub-Section, its members

drafted and submitted to the other members of the Section a report, which so clearly crystallizes the conclusions of the Section on the fundamental point involved that the Section gladly adopts that report as an expression of the views of the Section, to the extent to which the report goes in its recommendation of the creation of a Board of Statutory Consolidation, similar to the board established for a like purpose in New York; and in addition the Section, with the approval of the Los Angeles members, submits two other concurrent recommendations; one, looking to direct coöperation of the Association in framing an improved system of practice; the other, toward definitely establishing the right of the Supreme Court to promulgate, from time to time, rules designed to furnish a corrective for abuses in practice, or to mitigate the rigor of any existing regulation.

With this preface, and textually embodying the helpful work of the Los Angeles Sub-Section, we now present the following as an expression of the views of the Section upon the matters which it was appointed to investigate:

The Section found that its investigations should involve a consideration of the following four problems:

1. Is the present system of procedure bad enough to justify a radical change, involving, as such change will, some expense and considerable confusion in the institution of a new system?

2. Do we favor the substitution of rules of Court instead of a Code of Civil Procedure?

3. Shall such rules be made by the Supreme Court or by some Committee or Commission?

4. What specific requirements should be effected by any new system?

We agree unanimously that the first two questions should be answered affirmatively. The last two may be susceptible of many answers, none of which should be selected as the official view of this Association until a thorough study of the subject has been made. In our opinion this study should be entrusted to a board appointed by the State with a sufficient appropriation and sufficient clerical force to complete its work within the next two years.

In the first instance, the great body or bulk of the new rules of Court should be formulated by such a board. The initial work of compiling a code of rules is far too heavy to be cast upon the Justices of our Supreme Court or upon any other set of Judges. After the code of rules is adopted and in effect, their amendment and repeal, or enactment of new rules, and such other action with respect thereto as may be necessary to make the code efficient and flexible, can be carried on by a board consisting wholly or largely of Judges, without unduly diverting their attention from litigated matters which may be pending before them.

By an Act passed by the Legislature of the State of New York in 1904, a Board of Statutory Consolidation was created in that State, which after very careful study has made an elaborate report which was presented to the New York Legislature of 1915. A joint committee of the Legislature was then appointed to consider the adoption of that report, and it is probable that final action will be had in New York at the Legislative Session of 1917.

Believing that it will add to the conciseness and definiteness of our report, we have, with the aid of the precedent furnished us from New York, drafted an Act

for the creation of a Board of Statutory Consolidation, and have attached it to this report as "Exhibit 1."

We recommend that this Association, with the cooperation of other Bar Associations and of public organizations throughout the State, urge the passage of such Act at the coming session of our Legislature; also that a Committee be appointed to obtain the coöperation of such other Associations and of the press; and that such appropriation as the finances of this Association will warrant be made to pay the necessary expenses of that Committee.

While we thus favor the creation of a Board of Statutory Consolidation, we do not think that the activities of this Association should be restricted to such action alone. On the contrary, we believe that the Association, as an evidence of the recognition on the part of the legal profession of the duty it owes to society, should express its readiness and desire to coöperate with other bodies in the actual work of framing a well articulated practice Act and systematized rules of practice and that it should coöperate in particular with any board or commission which may be established by the Legislature. To that end, we recommend that the Association do now authorize the appointment of a Committee of one by the President, with instructions that such Committee shall submit its work from time to time to the Section on Pleading and Practice for comment and suggestion, and, in its report to the Association, shall lay before the Association the substance of all such comments and suggestions received; and that the Association further direct that the expenses of the Committee of one, including a reasonable compensation for services to be fixed or

allowed by the Executive Committee, shall be paid from the funds of the Association.

The work of preparing a suitable Practice Act or a system of Rules of Court for this State will necessarily consume time, even though it will be greatly expedited by the labors of the New York Board. In the meantime, if practice by rules of Court is really favored, there is no reason why there should not be an immediate and positive legislative declaration which shall make it clear beyond all peradventure that the Supreme Court is clothed with power to establish general rules of practice.

The power to regulate practice and procedure is properly a judicial power, and the rules should be subject to promulgation and change as the exigencies of the administration of justice may require. Before the adoption of statutory codes of civil procedure the recognized method of regulating practice was through general rules of Court. Since the adoption of codes, however, the Courts, though probably still competent to exercise their judicial prerogative, have in general acquiesced in, if they have not felt themselves controlled by, the legislative procedural enactments. If there is doubt about the inherence in the Courts of the power to promulgate rules of practice, even though they may conflict with statutory regulations, the time has come for an express declaration by the Legislature of its recognition of the power.

Said Professor Roscoe Pound in an address delivered before the Ohio State Bar Association, in 1915:

"What is needed in a practical matter of this sort is the possibility of making changes when they are needed, to have the new rule made by the people who have to apply and interpret it, to have it made with reference to concrete cases, and to have pleading and practice

develop from experience, just exactly as three-quarters of our ordinary substantive law does. If we had the flexibility and power of growth in procedure that we have in our substantive law, I venture to say we should have had very little difficulty with practice in this country."

No man is better qualified to speak from actual experience of the efficacy of practice under rules of Court than Chief Justice Olson of the Chicago Municipal Court. In an address delivered in San Francisco in May, 1916, on the work of the Court over which he presides, he spoke as follows:

"The rules of court are subject to being abandoned as well as adopted at the will of the court. If a rule is not a good one, it is abandoned; we can get rid of it just as quick as we got it. All we have to do is to call a meeting and pass a new rule or abolish the old one.

"We work in connection with the Bar Association in drafting rules. Any lawyer in Chicago is entirely at liberty to come, and we are glad to have him come in and ask for an improvement in the administration of justice. If any lawyer in this city can suggest an improved rule, the judges take the matter up with the committee of the Bar Association, and finally the whole court considers it, and if it seems to the judges to be a good rule, it will be adopted and put into force at once. We don't go to the Legislature, and wait from two or four or six years to get something done. You know, in this day of specialized business, with efficiency everywhere we haven't the time to do that. We have to reform our courts and put into them the same aggressive spirit as we do into our other organizations."

This Section is, therefore, strongly of the conviction,

that while we are looking forward to a broad and generous scheme of reform in practice, we should not delay in having action taken which shall clearly establish that the Supreme Court has the power to prescribe from time to time such rules as in its judgment may contribute to simplification of procedure and the furtherance of justice; and that this Association should recommend the adoption at the next Session of the Legislature of an enactment to the effect that the Supreme Court shall have power to prescribe rules of practice and procedure from time to time, and that when and as such rules of Court shall be promulgated, all laws in conflict therewith shall be and become of no further force or effect.

A provision to this effect could probably be made most advantageously as an amendment to Section 129 of the Code of Civil Procedure, and we attach to this report a draft of such proposed amendment as "Exhibit 2."

A similar law was adopted in Colorado in 1913, and a corresponding provision is contained in the bill now under consideration by Congress relating to rules designed to govern law cases in the Federal Courts.

With the foregoing recommendations we might end our report. We consider it advisable, however, to set forth the reasons which have led to our conclusions, believing that those reasons will fully justify our recommendations. This we have done in "Exhibit 3" attached to the report.

In conclusion we express our appreciation of the splendid assistance which has been given us by "The Recorder" of San Francisco, and the "Daily Journal" of Los Angeles. Both publications have given freely the use of their columns to communications from the members of this Committee and from the Bar at large relating

to the proposed reform in procedure and through the publicity so given much interest has been aroused in the work of the Section.

Respectfully submitted,
R. S. GRAY, Chairman
PERCY V. LONG
JOSEPH P. LOEB
LEWIS R. WORKS
WALTER PERRY JOHNSON

* * * * *

EXHIBIT 3

Reasons which have Influenced the Section in its Conclusions

(1) *Is the present system of procedure bad enough to justify a radical change; involving as such change will, some expense and considerable confusion in the institution of a new system?*

Just as this question needed no discussion in the special section, so it may be assumed that the entire membership of this association will agree without argument that under our codes the delay and cost of litigation are so great and miscarriage of justice so frequent that almost any expense and any degree of temporary inconvenience would be preferable, provided always that the reform be so complete that it will offer a reasonable hope of relief.

Patchwork amendment of existing statutes will not accomplish the purpose. There must be a radical change in the entire system.

The defective working of our courts, not only in the

State but elsewhere, is a matter of common knowledge and public reproach. Few, if any lawyers, will deny that a great part of their efficiency is due to the rigidity of the laws of procedure and even of court rules which control them.

The American Bar Association for years, and other societies throughout the country, have busied themselves with investigations into the causes of the evil and proposed remedies. There is an exhaustive literature on the subject, which renders it unnecessary for this committe to say more.

* * * * *

(2) *Do we favor the substitution of rules of court instead of a Code of Civil Procedure?*

This question also has been considered so thoroughly by so many organizations that we need do little more than refer to their reports, and to other pertinent literature.

A single quotation from the preliminary statement with which the New York Board of Statutory Consolidation accompanied its report to the Legislature is pertinent (Simplification of Civil Practice, 1915, Vol. 1, p. 6):

"Flexibility of the Rules"

"These rules, being subject to modification by the courts and not hard and fast statutory enactments, will discourage litigation over procedural matters, and place the responsibility for the efficiency of judicial administration upon the courts, where it belongs, rather than upon the legislature."

This expresses the end which we believe will be realized by transferring to the courts, virtually untrammeled, the right to regulate practice and procedure.

If proper attention be given to the preparation of such

rules, doubtless our new system will be more simple, less expensive, and more generally calculated to administer justice, than that under which we are struggling now. But the chief advantage to be expected is that of flexibility: Poor rules will be improved, vicious rules abrogated, and needed rules promulgated, promptly and without political or other interference.

Unless those rules in and of themselves are good, procedure will not be simplified; and even good rules will not eliminate altogether the technicalities of practice.

* * * * *

We conclude that for the sake of flexibility alone the change to rules of court is more than justified.

(3) *By whom, or by what sort of committee or commission should such rules of court be made?*

We already have indicated our conclusion that the first great body of rules should be compiled by a board, not consisting of judges whose time already is more than fully occupied.

Any doubt as to the magnitude of this labor will be removed quickly by an inspection of the report of the New York Board of Statutory Consolidation, consisting of five large volumes of statutes, rules, notes, tables, and explanatory matters, and a pamphlet of cross reference tables, all properly indexed.

After the system is once instituted, however, there must be machinery by which it can be changed from time to time and kept modern. There may be a difference of opinion as to the best machinery for the purpose.

In England, the power to prescribe rules is vested in, and may be exercised by, any five or more of the following persons, of whom the Lord Chancellor must be one; namely, the Lord Chancellor, the Lord Chief

Justice of England, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division of the High Court, and four other Judges of the Supreme Court to be from time to time appointed for the purpose by the Lord Chancellor; also two practicing barristers and two practicing solicitors, likewise appointed by the Lord Chancellor.

In New York, it is proposed to entrust this power to "the convention of justices assigned to the appellate division." (Report, vol. 1, p. 18.)

It must be remembered that the rules to which we refer will govern procedure and practice in all courts of the State. It may be and probably is wise to give to the Courts of Appeal and the Superior Courts, and perhaps the Justices' Courts as well, representation on the board.

The English plan also seems to have merit in that it gives to the practicing lawyer a membership on the board and an opportunity to impress upon the judicial members his point of view.

Whether any one of these plans in its entirety should be adopted in California, or whether we should have a combination system or an altogether new method, can be left with safety to the Board of Statutory Consolidation, which will have the ability, the resources, and the opportunity, to acquire all available information and reach its own conclusions.

The attention of that board is expressly directed to the subject by Section 3 of our draft act.

(4) *What specific reforms should be effected by any new system?*

This special committee has not been authorized to suggest specific amendments to our codes. We believe,

as we have said above, that we need more than patches on our existing laws; and though we have received numerous suggestions of desirable amendments, it would not serve the present purpose to mention them in detail here. An extract from one communication[1] may, however, be advantageously inserted, since it illustrates how easily certain inconsiderate provisions in our probate practice, susceptible of use to the prejudice of *bona fide* creditors, might be remedied by a rule of court, and how vexatious may be the complications ensuing from the present regulations before relief can be afforded by further legislative action.

* * * * *

EXHIBIT 4

(Laws of New York, 1904, vol. 2, page 1659.)

An Act to Provide for the Consolidation of the Statutes of the State

Became a law May 9, 1904, with the approval of the Governor. Passed; three-fifths being present.

Section 1. A Board of Statutory Consolidation is hereby constituted to consist of Adolph J. Rodenbeck, Charles Andrews, Judson S. Landon, William B. Hornblower and John G. Milburn, or such other persons as may be appointed by the governor in case of vacancy. The duty of such board shall be to direct and control the revision, simplification, arrangement and consolidation of the statutes of the State as hereinafter provided.

Section 2. The plan and scope of the work shall follow that adopted in the general laws, so far as prac-

[1] This letter relates solely to probate practice, and is omitted.

ticable. The statutes shall not be changed in substance except that as to matters of procedure such board shall report for enactment such amendments as it may deem proper and necessary to condense and simplify the existing practice and as shall adapt the procedure to existing conditions.

Section 3. The consolidation of the statutes herein provided for shall be carried on under the direction and control of said board by such persons as it shall designate and employ for that purpose whose compensation and necessary expenses shall be fixed by said board and paid by the comptroller on the certificate of the chairman or such other executive officer thereof as may be designated by said board from any appropriation that may be made for that purpose. The members of said board shall serve without compensation, but shall receive their necessary expenses and disbursements incurred in the discharge of their duties either at the capital or elsewhere which shall be paid in the same manner as the compensation and expenses of persons employed by said board.

Section 4. The board shall cause its work to be printed from time to time, and distribute copies of the same to members of the legislature, judges of the court, and such other persons as it may see fit for the purpose of obtaining their suggestion and advice. It shall report annually to the legislature upon the progress of the work and shall make its final report of the statutes so consolidated for enactment to the legislature of nineteen hundred and seven. The printing for said board may be done by the legislative printer, and payment therefor shall then be made out of the appropriation for legislative printing. Such board shall not be charged with the duty of advising as to current legislation.

Section 5. Such board, in its final report to the legislature shall suggest such contradictions, omissions and imperfections as may appear in the original text, with the manner in which they have reconciled, amended or supplied the same. It may also designate such statutes, or parts of statutes, as in its judgment ought to be repealed, with the reasons for such repeal, and may also recommend the enactment of any acts, or parts of acts, which such repeal may, in its judgment, render necessary.

Section 6. The sum of thirty-two thousand five hundred dollars is hereby appropriated out of any moneys in the treasury not otherwise appropriated for the purpose of carrying out the provisions of this act up to the first day of June, nineteen hundred and five, to be expended in the manner herein provided.

Section 7. This act shall take effect immediately.

Statute of New York in Pursuance of which the Proposed New Practice Was Prepared

Laws 1913, chap. 713, p. 1826.

An Act to simplify the civil practice in the courts of the State of New York.

Became a law May 24, 1913, with the approval of the Governor. Passed; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The board of statutory consolidation created by chapter six hundred and sixty-four of the laws of nineteen hundred and four and continued by chapter three hundred and ninety-three of the laws of nineteen hundred and twelve, consisting of Adolph J. Rodenbeck, William B. Hornblower, John G. Milburn, Adelbert Moot and Charles A. Collin, or such other per-

sons as may be appointed by the governor in case of vacancy, is hereby authorized and directed to prepare and present to the legislature as herein provided a practice act, rules of court and short forms as recommended by said board in its reports to the legislature of nineteen hundred and thirteen.

Section 2. Said practice act and court rules shall be based upon the present practice in the code of civil procedure and in the court rules as herein provided. Said act shall be confined to the statement of fundamental and jurisdictional matters relating to procedure and practice, substantive law and special practice being eliminated from the code of civil procedure and incorporated in appropriate consolidated laws or in new statutes. Said act shall be supplemented by rules of court to be adopted by the courts which shall regulate the important details of practice, minute statutory details of practice being omitted. The rules of court shall be submitted by the board with the practice act together with short forms for pleadings and other legal papers used in litigation. Said act and rules shall simplify and liberalize the present procedure as to joinder of causes of action and counterclaims, parties, pleadings, preparations for trial, trials, appeals and other proceedings so as to provide so far as practicable for one form of action, one trial of the facts and one course of appeal. Such other changes shall be made in the existing practice as may be deemed necessary to modernize procedure in the courts of general jurisdiction in the state and to simplify and expedite legal proceedings so that legal controversies may be speedily and finally determined according to the substantive rights of the parties.

Section 3. Said board of statutory consolidation shall

present a report to the legislature from time to time and a final report of the draft of the practice act, rules of court and forms to the legislature of nineteen hundred and fifteen or sooner if practicable. The board shall have power to conduct such inquiries as it may deem necessary to carry out the provisions of this act and to hold sessions and make such investigations as it may deem necessary in Albany or elsewhere and shall have power to employ such assistants as it may deem necessary to carry out the provisions of this act. The members of the board shall serve without compensation, except the chairman, who shall receive such compensation for his services as the board shall determine, but the necessary expenses and disbursements incurred in the discharge of any duties imposed by this act, together with the compensation allowed by the board to any person shall be paid by the comptroller out of any money herein appropriated upon proper vouchers therefor. Copies of its final reports and such other portions of its work as it may deem necessary shall be distributed to the members of the legislature, judges of the courts and such other persons as it may see fit for the purpose of securing their suggestions and advice. The necessary printing shall be done by the state printer and payment therefor shall then be made from the appropriation for legislative printing.

4. The sum of ten thousand dollars ($10,000) is hereby appropriated out of any moneys in the treasury not otherwise appropriated for the purpose of carrying out the provisions of this act up to the first day of June, nineteen hundred and fourteen, to be expended in the manner herein provided.

5. This act shall take effect immediately.

APPENDIX G

FORMS UNDER ENGLISH JUDICATURE ACTS

(a) Writ of Summons and Endorsement

Title of Court and Cause.

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Queen's Bench Division of Our High Court of Justice in an action at the suit of A. B.; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Roundell Earl of Selborne, Lord High Chancellor of Great Britain, the 1st day of December, one thousand eight hundred and eighty-three.

The defendant may appear hereto by entering an appearance either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

INDORSEMENTS TO BE MADE ON THE WRIT BEFORE ISSUE THEREOF

The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a business.

This writ was issued by E. F., of 14, K. B. W., Temple, London, solicitor for the said plaintiff, who resides at 20, K. Street, London, N.

INDORSEMENT MADE ON THE WRIT AFTER SERVICE

This writ was served by X. Y. on C. D., the defendant, on Tuesday the day of

(Signed) X. Y.
Of P. Q. Street.

(b) MEMORANDUM OF APPEARANCE AND DEMAND FOR STATEMENT OF CLAIM

Title of Court and Cause.

Enter an appearance for C. D. in this action.

Dated this day of

Solicitor for the defendant.

The said defendant requires a statement of claim to be filed and delivered.

(c) STATEMENT OF CLAIM

Title of Court and Cause.

The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the lease, fixtures, fittings, good will, and stock-in-trade of a baker's shop and business by fraudulently representing the same as an increasing business, and doing twelve sacks a week, whereas in fact it was a declining business, and for a long time before it had never been a business of more than eight sacks a week to the defendant's knowledge.

Particulars of special damage.——£500 purchase-money paid by plaintiff to defendant, with interest; £75 loss of bargain, time, etc.

The plaintiff claims £600 damages.

(Signed) L. M.,
Barrister-at-Law.

(d) Statement of Defense

Title of Court and Cause.

1. The defendant denies that he represented that the business was an increasing business and doing twelve sacks a week, or made either representation.

2. He denies that the business was in fact a declining business and doing eight sacks.

3. The defendant denies that the plaintiff was induced to buy the said business by any representation of the defendant's.

4. The defendant admits the receipt of £500 purchase-money, and denies the damage alleged.

(e) Reply

The plaintiff joins issue upon the defendant's statement of defense.